SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 588

PERRY ZIMMERMAN,

Petitioner,

vs.

BOARD OF EDUCATION OF THE CITY OF NEWARK and EDWARD F. KENNELLY, SUPERINTENDENT OF SCHOOLS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW JERSEY SUPREME COURT.

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TABLE OF CONTENTS.

	PAGE
PETITION FOR A WRIT OF CERTIORARI TO THE NEW JERSEY SUPREME COURT	1
OPINION BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES AND CONSTITUTIONAL AMENDMENTS INVOLVED	3
UNITED STATES CONSTITUTION	3
NEW JERSEY STATUTES	4
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE WRIT	9
I. The questions presented are substantial	9
II. The New Jersey decision is not in accord with prior rulings of this Court	11
CONCLUSION	15
Appendix A—Decision of the State Board of Education	16
Appendix B—Decision of Commissioner of Education November 9, 1960	19

CASES CITED.

Adams v. *Maryland*, 347 U. S. 179 (1954)	12
Beilan v. *Board of Education*, 357 U. S. 399 (1958)	10, 11

PAGE

Laba v. *The Newark Board of Education*, 23 N. J. 364, 129 A. 2d 273 (1957) 2, 6, 10, 12

Lerner v. *Casey*, 357 U. S. 468 (1958) 13, 14

Nelson v. *Los Angeles County*, 362 U. S. 1 (1960) .. 13, 14

Slochower v. *Board of Higher Education of City of New York*, 350 U. S. 551 (1956) 6, 12, 13

Vitarelli v. *Seaton*, 359 U. S. 535 (1959) 13, 14

UNITED STATES CONSTITUTION CITED.

First Amendment 2, 3
Fifth Amendment 3, 9, 12, 13
Fourteenth Amendment 2, 3, 4, 9

FEDERAL STATUTE CITED.

28 U. S. C. A. Sec. 1257 (3) 2

NEW JERSEY STATUTES CITED.

Laws of 1940, c. 43, p. 125, § 1 5
Laws of 1952, c. 236, p. 796, § 12 5

N. J. S. 18:13-16 4

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW JERSEY SUPREME COURT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Perry Zimmerman, petitions for a Writ of Certiorari to review the final judgment of the New Jersey Supreme Court which affirmed the previously rendered decisions of the State Commissioner of Education and State Board of Education which granted to the petitioner back pay for a one-month period but failed to reinstate the petitioner to his position as a teacher in the Public School system of the City of Newark.

Opinions Below.

The majority and concurring opinions of the New Jersey Supreme Court are reported at 38 N. J. 65, 183 A. 2d 25 (1962). A previous decision of the New Jersey Supreme Court in which petitioner was an appellant is reported in the matter of *Laba* v. *The Newark Board of Education*, 23 N. J. 364, 129 A. 2d 273 (1957). The opinion of the State Board of Education and the State Commissioner of Education are not officially reported. (Appendix, infra, pp. 16 to 29).

Jurisdiction.

The final judgment of the New Jersey Supreme Court was entered on June 29, 1962. The time within which a petition for a writ of certiorari may be filed with this Court was extended by Order of this Court to November 11, 1962. The jurisdiction of this Court is invoked under 28 U. S. C. A. Section 1257 (3).

Questions Presented.

1. Is it a violation of the due process clause of the Fourteenth Amendment and an abrogation of petitioner's rights under the First Amendment of the United States Constitution for a state to dismiss a public school teacher and deprive him from obtaining tenure simply and as a direct result of his refusal to answer questions asked by a Congressional Sub-Committee about his membership in the Communist Party where such asso-

ciation was lawful at the time it was alleged to exist and where no hearing on the question of the teacher's loyalty is accorded to him.

2. Whether the State of New Jersey unconstitutionally, arbitrarily, unreasonably and in violation of the rulings of this Court, unduly deprived petitioner of his rights to invoke the privileges of the Fifth Amendment, to associational privacy, to academic freedom, and to First Amendment freedoms, all in violation of the due process clause of the Fourteenth Amendment.

3. Did the petitioner obtain academic tenure by virtue and as a result of the actions undertaken by the State and did the State arbitrarily and unreasonably dismiss the petitioner without a hearing in violation of the due process clause of the Fourteenth Amendment to the United States Constitution.

Statutes and Constitutional Amendments Involved.

United States Constitution.

Amendment (I)

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment (V)

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land

or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment (XIV)

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New Jersey Statutes.

18:13-16. *Tenure of teachers, principals and superintendents and assistants.*

The services of all teachers, principals, superintendents and assistant superintendents, of the public schools, excepting those who are not the holders of proper teachers' certificates in full force and effect, shall be during good behavior and efficiency, (a) after the expiration of a period of employment of three consecutive calendar years in that district unless shorter period is fixed by the employing board, or (b) after employment for three consecutive academic years together with employment at the beginning of the next succeeding academic year, or (c) after employment, within a period of any four consecutive academic years, for the equivalent of more than three academic years, some

part of which must be served in an academic year after July first, one thousand nine hundred and forty; provided, that the time any teacher, principal or supervising principal had taught in the district in which he was employed at the end of the academic year immediately preceding July first, one thousand nine hundred and forty, shall be counted in determining such period or periods of employment in that district.

An academic year, for the purpose of this section, means the period between the time school opens in the district after the general summer vacation until the next succeeding summer vacation. As Amended L. 1940, c. 43, p. 125, § 1; L. 1952, c. 236, p. 796, § 12.

Statement of the Case.

The petitioner is a school teacher. He was employed by the Board of Education of the City of Newark, New Jersey, on July 30, 1952. He commenced his teaching duties on September 1, 1952, and his contract was renewed in 1953 and 1954. During the period 1946 to 1948, the petitioner was a member of the Communist Party. When the petitioner commenced his employment with the City of Newark, he had been an ex-communist for four years. On May 19, 1955, this teacher was subpoenaed to appear before a Sub-committee of the House Un-American Activities Committee sitting in Newark, New Jersey. Upon advice of counsel, petitioner refused to answer questions asked by the Sub-committee pertaining to his membership in the Communist Party. His refusal was based upon the Fifth Amendment's protection against incrimination. As a result of the exercise of his constitutional rights before the Sub-committee on May 19, 1955, the next day, on May 20, 1955, this teacher was summarily suspended by the Newark

Superintendent of Schools. On May 23, 1955, the Superintendent of Schools of the City of Newark filed charges against petitioner with the Newark Board of Education which in substance alleged that petitioner's conduct and testimony at the Sub-committee hearing rendered him guilty of conduct unbecoming a teacher, affected his capacity to perform his duties and constituted just cause for dismissal. After his appearance before the Newark Board of Education on June 21, 1955, the Board on June 28, 1955 dismissed petitioner effective as of May 19, 1955. The Board sustained the charges as submitted by the Superintendent. The sole reason for the discharge of petitioner was the fact that he invoked his rights under the Fifth Amendment in response to questions presented to him by the Sub-committee of the House Un-American Activities Committee.

Upon appeal from the decision of the Board to the Supreme Court of New Jersey, the actions of the Board were condemned and the matter was remanded on February 4, 1957, for hearings in accordance with the court's mandates. *Laba* v. *Newark Board of Education*, 23 N. J. 364, 129 A. 2d 273 (1957). The basis for the reversal was this court's decision in *Slochower* v. *Board of Higher Education of City of New York*, 350 U. S. 551 (1956). On March 20, 1957, the Newark Board of Education directed the Superintendent of Schools to conduct an inquiry and report to the Newark Board of Education the results of such inquiry, "to the end that the Board may then make such further inquiry and take such further action as the facts and circumstances warrant."

On May 16, 1957, petitioner appeared with counsel before the Superintendent of Schools in Newark. Petitioner

answered all questions as fully as possible. The Superintendent during the inquiry manifested general satisfaction with his responses. Nevertheless, on October 22, 1957, the Superintendent filed supplementary charges against petitioner with the Newark Board of Education charging, for the first time, that Perry Zimmerman failed to cooperate at the interview conducted on May 16, 1957, and failed to give frank and full answers.

The interview, which took place on May 16, 1957, lasted two hours and twenty-five minutes. Petitioner actually did answer each and every question at length. He admitted membership in the Communist Party from 1946 to late in 1948 and testified as to his reasons for joining and leaving the Party. Chief Justice Weintraub, in his concurring opinion rendered in this cause, stated: "He (petitioner) answered *every question* put to him. Nonetheless, the Superintendent made no finding upon the *target issue* of present loyalty. Nor did the Superintendent find (and he could not) that Zimmerman *refused to answer* any question * * *" (38 N. J. at 82).

A further hearing was conducted by the Newark Board of Education from November 4, 1957, to December 18, 1957. This hearing was based, not upon the original charges but solely upon the Supplemental Charges filed by the Superintendent. In support of these charges, the transcript of the Superintendent's interview, dated May 16, 1957, was introduced in evidence. At this Board hearing, the petitioner's principal testified that he had rated petitioner as "satisfactory" and that tenure would follow from said rating as a matter of course. Tenure arises wherein a probationary teacher signs a fourth contract with the same school system

and teaches one day under said fourth contract. On June 24, 1958, the Newark Board of Education adopted a resolution dismissing petitioner effective as of May 20, 1955, for his failure to cooperate with the Superintendent and with the Board. As to the allegation of his failure to cooperate with the Board no charges were ever made, presented and heard charging petitioner with such failure to cooperate.

An appeal was taken by the petitioner to the State Commissioner of Education. On November 9, 1960, the Commissioner held that the dismissal by the Board of Education of petitioner effective as of May 20, 1955, was invalid because the Board's dismissal reverted to a time prior to the acts justifying it. Petitioner was awarded back pay from May 20, 1955, to June 30, 1955. However, as to Zimmerman's continued employment, the Commissioner refused to reinstate him because he had not acquired tenure. The decision states:

> "If injustice occurs to a teacher because litigation interrupts the continuity of the employment essential to the acquisition of tenure, the remedy must lie with the legislature."

The Commissioner expressed no opinion as to the merits of the case but stated that he could not grant the relief requested to wit, reinstatement and reemployment, because he had not acquired tenure. The State Board of Education affirmed the decision of the State Commissioner of Education. Upon further appeal, the matter came before the New Jersey Supreme Court, which affirmed the decisions of the State Commissioner of Education and the State Board of Education. Three concurring opinions were filed by justices of the New Jersey Supreme Court.

Reasons for Granting the Writ.

I. The questions presented are substantial.

This case presents important questions involving the protection of an individual's rights to personal, associational and academic freedom and liberty as protected by the Due Process clause of the Fourteenth Amendment and the right of every citizen to exercise those constitutional protections encompassed in the Fifth Amendment. As the constitutional guardian of these liberties, this Court is requested to review the petitioner's despairing pursuit of these goals. Despite continuous litigation during the past six years, the petitioner has been unsuccessful in his attempt to remove the stigma of this suspension and ultimate discharge. The petitioner was summarily discharged from his position as a teacher as of May 20, 1955, as the direct and sole result of his having "pleaded the Fifth Amendment" before a Congressional Sub-committee.

The petitioner's work and performance as a teacher was satisfactory and, *but* for his exercise of his constitutional rights under the Fifth Amendment before a Sub-committee of the House Un-American Activities Committee on May 19, 1955, petitioner would have attained academic tenure in accordance with the laws of New Jersey. This fact cannot be ignored nor severed from the proceedings which followed. The State Commissioner of Education's opinion clearly reflects the denial of petitioner's constitutional rights. The State Commissioner of Education was seeking an easy way out, and in doing so, his decision rendered, proceeding on the basis of lack of tenure, clearly reflects the denial of petitioner's constitutional rights. But the

reason, and the only reason, why petitioner was suspended was his exercise of his constitutional rights, and the failure of the school board to renew petitioner's contract is attributable solely to his suspension. This suspension was declared invalid in *Laba* v. *Newark Board of Education, supra.*

The record explicitly reveals that petitioner's suspension was a direct result of his exercise of his constitutional rights. There never has been a determination whether his contract should or should not have been renewed and therefore these constitutional rights will continue in the future to be impaired. The foregoing is evident by virtue of the decision of the Newark Board of Education rendered on June 24, 1958, which dismissed petitioner retroactively as of May 20, 1955, for subsequent acts allegedly committed on May 16, 1957, and November 14, 1957. The fact that the Newark Board of Education made petitioner's discharge retroactive to the day after petitioner exercised his constitutional rights is mute evidence of the reasoning and intent of that body. In *Beilan* v. *Board of Education,* 357 U. S. 399 (1958), the petitioner was suspended five days after his refusal to answer questions before the House Sub-committee. This was thirteen months after he had refused to answer the same questions before the School Superintendent but was permitted to teach during this thirteen-month interim period. Mr. Chief Justice Warren commented that the actions of the petitioner before the House Sub-committee were "inextricably involved in the Board's decision to discharge him" and "that the validity of the Board's action cannot be sustained without consideration of this ground." If the conclusion of guilt *may* "rest on a constitutionally impermissible basis, the adjudication

must be set aside, notwithstanding a state court's conclusion that permissible bases existed on which the decision might have rested." (357 U. S. at 412).

The foregoing issues are important in the development of the law pertaining to the constitutional limitations upon the rights of states to discharge their employees.

The questions are important to teacher's tenure, an essential part of democratic education and the continued existence of academic freedom.

This case is important because it presents the problem of whether the State may extinguish these rights by a subterfuge as blatant as this one.

The importance of these issues to our democratic society and its system of public education is highlighted by the necessity of the Supreme Court of New Jersey to render three concurring opinions in this case.

For these reasons, and additionally the fact that the House Sub-committee continues to subpoena teachers before it and State Boards of Education continue to discharge teachers for exercising their constitutional rights before such House Sub-committee, the review of this case is important.

II. The New Jersey decision is not in accord with the prior rulings of this Court.

The opinion of the New Jersey Supreme Court together with its three concurring opinions and the opinions of the State Commissioner and the State Board of Education reveal that this school teacher was dismissed because he was a former member of the Communist Party, the protesta-

tions of the Board of Education to the contrary notwithstanding.

The actions by the School Board and the State Commissioner were an obvious attempt to bypass this Court's opinion in *Slochower* v. *Board of Higher Education of City of New York*, 350 U. S. 551 (1956). The petitioner was never afforded a hearing on the original charges as drafted by the Superintendent of Schools in 1955; nor was the petitioner afforded a hearing within the terms of the mandate of the New Jersey Supreme Court issued on February 4, 1957, as rendered in *Laba* v. *Newark Board of Education*, 23 N. J. 364, 129 A. 2d 273 (1957), in which petitioner was an appellant; nor was the petitioner ever afforded a hearing as to tenure; nor a hearing as to his alleged non-cooperation with the Newark Board of Education. The right to refuse, when interrogated by a Congressional Committee, to answer self-incriminating questions is guaranteed by the Fifth Amendment to the United States Constitution. *Adams* v. *Maryland*, 347 U. S. 179 (1954). The decision by this Court in *Slochower* requires that a teacher be given and is entitled to receive a fair hearing by the educational institution concerning his testimony before the Congressional Committee. Furthermore, the State cannot require, as a condition of exercising that right, that he surrender his means of livelihood. Such a course of action by the State is a denial of the right. The important questions here presented are an attempt to erode the foregoing doctrines. The petitioner was never granted such a hearing.

Despite this Court's decision in *Slochower* and the mandate in *Laba* by the New Jersey Supreme Court, the State Commissioner utilized a not too subtle technique to avoid

the consequences of *Slochower*. This conclusion is substantiated by the concurring opinion of the Chief Justice of the New Jersey Supreme Court wherein he agrees that the purported proceedings did not conform with the mandate of that Court, did not afford petitioner a fair hearing, and that no findings were made as to the petitioner's loyalty or his willful refusal to testify. A governmental agency should not be allowed to cut corners to reach a desired result.

The Newark Board of Education did not render any findings as to petitioner's loyalty nor did petitioner refuse to answer any question propounded by the Superintendent of Schools or the Newark Board of Education. The Chief Justice of the New Jersey Supreme Court said in this regard:

> "I believe the Board, taking into account the climate of the times and the fears, however unwarranted, of the parents of students, could conclude it is the course of prudent management to employ someone else. That, it seems to me, was the decision the Board made." (38 N. J. at 81).

This climate permeated the entire procedure followed throughout this case. This court has consistently held that a public employee cannot be arbitrarily discharged or refused continued employment because the public employee exercised his constitutional rights under the Fifth Amendment.

The proceedings and decisions in this case are also in derogation of this court's opinions in *Vitarelli* v. *Seaton*, 359 U. S. 535 (1959); *Nelson* v. *Los Angeles County*, 362 U. S. 1 (1960) and *Lerner* v. *Casey*, 357 U. S. 468 (1958).

Vitarelli involved the employment rights of a governmental employee who could have been summarily discharged at any time without the giving of a reason. This Court concluded that where the Secretary gratuitously decided to give a reason and that reason was national security, he was obligated to conform to certain procedural standards prior to dismissal. This Court ordered reinstatement despite an attempt by the Secretary, during the course of the proceedings, to discharge the employee without setting forth reasons. In *Nelson*, this Court granted review to consider whether a temporary employee, who could be summarily discharged, should be reinstated where his discharge was arbitrary and unreasonable by virtue of his invocation of his rights before a Congressional Sub-committee. These decisions are a clear recognition of the doctrine that even a probationary employee has constitutional rights which this Court will protect. If a state or one of its agencies discharges or refuses to reinstate a non-tenure employee and gives a reason for such actions, the reasons given must be within the framework of the United States Constitution. For example, if a probationary employee is discharged because of his race or religion, such action could not be squared with the United States Constitution. The refusal by the New Jersey Supreme Court, as indicated in the opinion of the court by Justice Schettino, to give any credence to petitioner's constitutional rights is in complete opposition to this court's decision in *Vitarelli*, *Nelson* and *Lerner*.

Conclusion.

For the reasons hereinabove stated, this Petition for a Writ of Certiorari to the New Jersey Supreme Court should be granted.

Respectfully submitted,

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APPENDIX A.

Decision of the State Board of Education.

While we agree with the Commissioner's disposition of this appeal, we prefer to base our affirmance somewhat more narrowly. In our view, the problems presented here are rooted in the fact that this petitioner, a nontenure teacher at the time of his original dismissal in 1955, found common legal cause with two tenure teachers for purposes of the litigation culminating in *Laba* v. *Newark Board of Education*, 23 N. J. 364 (1957). An appreciation of the precise reason therefor dispels all confusion.

When the petitioner was discharged by order of the local board on June 23, 1955, he did not have tenure, but only a one-year contract due to expire on June 30, 1955. The order rendered his dismissal effective as of May 20, 1955. At the time of his discharge, as now, N. J. S. A. 18:13-11 provided:

> "When the dismissal of any teacher before the expiration of a contract entered into between the teacher and a board of education shall, upon appeal, be decided to have been *without good cause*, the teacher shall be entitled to compensation for the full term for which the contract was made; but it shall be optional with the board of education whether the teacher shall or shall not teach for the unexpired term." (Emphasis added.)

Although the statute appears primarily designed to protect the contractual rights of nontenure teachers, it correlatively empowers local boards to dismiss such teachers for any reason whatever, whether with or without cause, provided only that teachers discharged "without good cause" must be compensated for the full terms of their contracts. Thus the cause of this petitioner's dismissal in 1955 was

then significant only to the issue of whether he was entitled to compensation for the period commencing on May 20, 1955, the effective date of his dismissal, and June 30, 1955, the expiration date of his contract of employment. Under the clear terms of the statute, he had no other grievance on appeal. We have no doubt that if petitioner's appeal from his 1955 dismissal had been heard individually, it would have been decided in that context.

In fact, however, this appeal was heard in conjunction with those of Dr. Lowenstein and Mrs. Laba, teachers who were dismissed at the same time and on the same grounds. Unlike this petitioner, his companions then enjoyed tenure, and therefore could not have been dismissed without "just cause". N. J. S. A. 18:13-17. Notwithstanding this basic distinction in status, all three appeals presented the identical issue of "just cause", or "good cause" and they were therefore heard and decided together. The objective of Zimmerman's appeal, however, necessarily differed from that of his co-appellants. A tenure teacher is entitled to reinstatement upon a showing that his discharge was without "just cause", N. J. S. A. 18:13-17, while a nontenure teacher, upon the same showing, is entitled only to compensation for the unexpired term of his contract of employment. N. J. S. A. 18:13-11. It is clear that both the Commissioner and the Supreme Court were well aware that although the ultimate legal issue raised by Zimmerman's appeal was identical with the question raised by the appeals of his colleagues, Zimmerman was at best entitled to different and limited relief:

> "Both Dr. Lowenstein and Mrs. Laba duly acquired tenure protection under the New Jersey School Laws. See R. S. 18:13-16; R. S. 18:13-17. Mr. Zimmerman * * * had not acquired tenure protection when he was dismissed by the board. However, in view of the terms of R. S. 18:13-11, all of the

parties and the State Commissioner have, *for present purposes,* not differentiated his case from the others." (Emphasis added.)

Laba v. *Newark Board of Education, supra,* 23 N. J. at 370.

On this basis, the Supreme Court in *Laba* affirmed the Commissioner's remand of all three proceedings for further inquiry in consonance with the principles established in the appellate litigation. Notwithstanding the fact that Zimmerman's 1954-1955 contract had long since expired, and of course had not been renewed, the local board in 1957 chose to conduct further investigation and hearings with respect to his fitness to teach in the public school system. Whether such further proceedings were worthwhile in relation to the stakes involved, i. e., five or six weeks' salary, is a matter of local wisdom beyond the range of effective comment on our part. In any event, a preliminary inquiry led to the filing of "supplementary charges" against Zimmerman, which charges in fact constituted entirely new ones pertaining to his conduct after the expiration of his contract of employment. Hearings on these new charges led to an order of the board entered June 24, 1958, which dismissed petitioner effective May 20, 1955. The matter is before us on appeal from the Commissioner's affirmance of this order.

We have said that when petitioner was originally dismissed in 1955, he was not entitled to challenge the dismissal as to cause for the purpose of winning reinstatement. N. J. S. A. 18:13-11. We now find that nothing has since occurred to enlarge his rights in this respect. On this appeal, he argues in effect that the local board, by electing to pursue the inquiry as to him after the *Laba* decision, has conferred some sort of *de facto* tenure upon him. We find the contention specious for the reasons set forth by the Commissioner.

Finally, we agree with the Commissioner that since the petitioner was in fact dismissed on the basis of entirely new charges relating to his conduct after the termination of his contract of employment, he is entitled to the amount of compensation that would have been due him from the effective date of his discharge, May 20, 1955, to the expiration date of his contract of employment, June 30, 1955.

The judgment of the Commissioner is affirmed in all respects.

Dated: December 6, 1961.

APPENDIX B.

Decision of Commissioner of Education November 9, 1960.

For the Appellant, LEVY, LEMKEN & MARGULIES (SEYMOUR MARGULIES, of Counsel).

For the Respondent, JACOB FOX.

This is an appeal by a teacher from an order of the Board of Education of the City of Newark, dated June 24, 1958, which dismissed him from its employ as of May 20, 1955. The applicant prays that the Commissioner direct his reinstatement to his former position as teacher with the Newark Board of Education with back pay from the date of his dismissal.

This case originally came before the Commissioner of Education on an appeal from a dismissal ordered by the Board of Education on June 23, 1955, which was based solely on the proposition that in a Congressional inquiry

into Communism and subversion generally, the applicant had invoked the privilege against self-incrimination in refusing to answer certain questions as to his affiliations and associations, and that such conduct was just cause for his dismissal. Because appellant had not acquired tenure, any dismissal of him would be according to R. S. 18:13-11. However, because two other tenure teachers appealed concurrently to the Commissioner under R. S. 18:13-17, all the parties and the Commissioner at that time did not differentiate appellant's petition from the others. On that appeal the Commissioner reversed the decision of the Newark Board of Education and remanded the case to the Board for further proceedings not inconsistent with the opinion of the United States Supreme Court in *Slochower* v. *Board of Education*, 350 U. S. 551. Subsequently, on an appeal to the New Jersey Supreme Court, the decision of the Commissioner was affirmed. *Laba* v. *Newark Board of Education*, 23 N. J. 364, 394.

On the remand to the local Board, the matter was referred to its Superintendent of Schools for further inquiry consonant with the decision of the Supreme Court. Under date of May 10, 1957, the Superintendent, by letter, requested appellant to appear in his office on May 16, 1957, for an interview relating to his fitness to teach in the public schools. The following is an excerpt from the letter:

> "At the interview you will be afforded the opportunity to respond frankly and full to questions pertinent to the matters discussed in a recent decision of the New Jersey Supreme Court in connection with the remand of appeal relating to your previous dismissal by the Newark Board of Education. The sole purpose of the interview is to determine the truth in terms of frank and full disclosures without equivocation or mental reservation."

Appendix B—Decision of Commissioner of Education November 9, 1960.

The interview was held on May 16, 1957. After appellant explained that he had invoked his privilege against self-incrimination before the House subcommittee under the Fifth Amendment on the advice of counsel, the Superintendent did not pursue this subject any further. He was, however, not satisfied with appellant's responses to other questions. As a result the Superintendent, on October 22, 1957, filed supplementary charges with the Board relating to appellant's continued fitness to teach. The charges were based on appellant's alleged failure to fulfill his duty of cooperation with the Superintendent with respect to the inquiry into his fitness to teach in that he failed to give frank and full disclosures as to past association with the Communist Party and affiliated organizations and that many of his responses were incredible, indirect, or otherwise inadequate from the standpoint of forthrightness.

The Board of Education held hearings on these charges in November and December, 1957. It decided that the whole truth as to the appellant's past affiliation with and his reported withdrawal from the Communist Party was not disclosed by him; that facts called for by pertinent questions were withheld by him; and that the Superintendent and the Board were not accorded the cooperation they were entitled to have from him in their inquiry. The Board drew no inference as to present affiliation with or subservience to the Communist Party but held that the record amply revealed that appellant, at the Superintendent's interview, obstructed a bona fide inquiry into the truth of whether or not he is now a member of the Communist Party or subject to its ideologies and discipline. Accordingly, his dismissal was ordered as of May 20, 1955, the effective date of the original dismissal:

> "The adoption of this resolution is not intended to constitute an acknowledgment that Mr. Zimmer-

> man had any employment or tenure status with the Board, and shall not be deemed to extend to him any status, for any period beyond the 1954-1955 school year, when the period of his probationary employment expired."

It should also be pointed out that a similar statement was contained in the resolution of September 24, 1957, ordering further proceedings against appellant.

The Commissioner will decide first whether the dismissal may be sustained as of May 20, 1955. The Supreme Court, in the case of *Lowenstein* v. *Board of Education of Newark*, 33 N. J. 277, said that after the teacher told the Superintendent he had claimed the privilege against self-incrimination before the subcommittee on the advice of counsel and that subject was quite properly not pursued further, the matter of contumacious or frivolous refusal to answer as a basis for disciplinary action was thereby permanently removed from the case and nothing remained with respect to the original charges. While no special point was made of it before the Court, it was said in the decision that the motion should have been granted since no basis remained to support a claim of any improper conduct before the subcommittee.

The Court also said that the "supplementary" charges preferred by the Superintendent after the interview were actually new ones. The Commissioner took a similar view in his decision on the same case (*Lowenstein* v. *Board of Education of the City of Newark*, decided June 1, 1959). In this decision the Commissioner said:

> "The proceedings by the superintendent and the board of education on the remand were not addressed to his conduct before the House Sub-Committee, but rather to his past activities and associations as these

> might bear upon subjection to the ideologies and disciplines of the Communist Party. It was in an inquiry on the latter subject that the appellant exhibited his lack of candor which led the respondent board to conclude that he was unfit to remain a teacher in its schools. Our Supreme Court has already held that petitioner's conduct before the House Sub-Committee was not *per se* just cause for dismissal and no further evidence has been presented to prove that his conduct before the House Sub-Committee was unbecoming that of a teacher."

The Commissioner held that the dismissal should not revert to a time prior to the acts justifying it, that the applicant, therefore, should be dismissed effective May 16, 1957, and, furthermore, that the appellant should be paid by the respondent board of education the salary which became due him between May 20, 1955 and May 16, 1957. More recently, the Commissioner, on October 24, 1960, in the latest appeal of Dr. Lowenstein, reaffirmed this decision as to the effective date of dismissal. *Lowenstein* v. *Newark Board of Education,* decided October 24, 1960.

The factual situation in the instant case is similar and, therefore, the Commissioner's decision in the *Lowenstein* case, that the dismissal should not revert to a time prior to the acts justifying it, is controlling here. The Commissioner holds that the Board erred in dismissing appellant as of May 20, 1955, and that he is entitled to salary which came due between May 20, 1955, and the end of his employment in June, 1955.

With regard to appellant's prayer that he be reinstated in his position as teacher, the Commissioner is without power to give the relief requested. Appellant had not acquired tenure of position in the Newark schools. His em-

ployment, dating from September 1, 1952, was on academic year basis. He needed employment in the academic year 1955-1956 in order to acquire tenure. The Board did not re-employ him after the expiration of his three-year period of probationary employment on June 30, 1955, and he, therefore, failed to acquire tenure and his employment rights ceased as of that date. At the expiration of his probationary employment, appellant lost the protection afforded by N. J. S. A. 18:13-11 and had not acquired the protection of N. J. S. A. 18:13-17. The courts have refused to review the dismissal of non-tenured teachers and have limited their determination to the sole question of whether or not the teacher in fact had tenure status. *Chalmers* v. *State Board,* 11 N. J. Misc. 781; *Gordon* v. *State Board of Education,* 132 N. J. L. 356; *Schultz* v. *State Board of Education,* 132 N. J. L. 345; *Moresh* v. *Board of Education of Bayonne,* 52 N. J. Super. 105. The statutes (N. J. S. A. 18:6-20, 18:13-5) clearly place the responsibility with the board of education to determine whether or not teachers should be employed or re-employed during the probationary period provided by law. The Commissioner has never attempted to substitute his judgment for that of the board of education in determining whether a non-tenure teacher should be re-employed. For this reason and for the further reason that he is without power to order the re-employment of appellant, the Commissioner will express no opinion on the merits of the case.

Appellant contends that notwithstanding the fact that tenure had not accrued, justice would require that he be reinstated to his position if the charges of the Board were not sustained on this appeal. The testimony of appellant's principal discloses that he had rated him "satisfactory". Usually tenure would have come automatically following such a rating. The principal appended the following statement to his rating:

Appendix B—Decision of Commissioner of Education November 9, 1960.

"This record concerns work at Dayton. Permanent appointment should be deferred until results of trial on June 21st."

In oral argument, counsel for appellant maintained that the Commissioner has the power to reinstate him because the statutes give him complete superintendence over the school system. Appellant also, in his brief, argues that the proceedings before the Superintendent occurring after the expiration of his probationary employment, imply a relationship of teacher and superintendent. Absent the teacher-superintendent relationship on May 16, 1957, the reasons, it would be impossible to predicate charges on supplement the original charges because if appellant was not a teacher as of May 16, 1957, he was under no obligation to appear to speak. If there had been no teacher board of education-superintendent relationship existing, the whole matter, in so far as appellant is concerned, would have been moot and the time of the court wasted. Having prosecuted appellant on the basis of a teacher relationship, the Board is now estopped from denying the existence of that relationship, he claims.

Respondent argues that if the suspension of a non-tenure employee causes his employment to continue after the period of employment under his appointment ends, then an employee might acquire, during litigation, a right to permanent status which he did not have when the litigation began. Appellant never had any appointment from the Board for any period after the end of the 1954-1955 academic year. Respondent further points out that charges were preferred against appellant in the first instance and formal hearings held thereon, not because appellant was under tenure, but because he had been appointed for the 1954-1955 academic year and therefore could not be dis-

missed before June 30, 1955 "without good cause". (N. J. S. A. 18:13-11). The procedure for charges and hearing is not defined by statute in the case of teachers under contract and the Board, therefore, employed the procedures defined in N. J. S. A. 18:13-17 and 18 for tenure teachers. This, respondent contends, was the only proper course to pursue as there could be no justification for according less procedural safeguards for a teacher under contract than those prescribed for a teacher under tenure.

Respondent further argues that the principle of estoppel is nowhere present because appellant had no tenure which the Board could be estopped to deny. Reference is made to the statements in the brief filed by the Board with the Supreme Court, the resolution for further proceedings, and the resolution of dismissal in each of which the Board specifically disclaimed any tenure rights of appellant. Respondent also cites the decision of the Supreme Court, in the *Laba* case, *supra*, where it was said:

> "Mr. Zimmerman began teaching in the public school system in 1952 and had not acquired tenure protection when he was dismissed by the Board. However, in view of the terms of R. S. 18:13-11, all of the parties and the State Commissioner have, for present purposes, not differentiated this case from the others."

New Jersey Statutes Annotated, 18:3-7 reads as follows:

> "The Commissioner shall be the secretary of the state board. He shall enforce all rules and regulations prescribed by the state board. He shall have supervision of all schools of the state receiving any part of the state appropriation."

Appellant considers the power of the Commissioner under this statute adequate to redress any alleged injustice which might be done to him by reason of the fact that his suspension prevented his fulfilling the conditions prerequisite to the acquisition of tenure pursuant to N. J. S. A. 18:13-16. The Commissioner does not agree. The power granted to him under N. J. S. A. 18:3-7 is general. The conditions for acquiring tenure under N. J. S. A. 18:13-16 are specific. It was held in the case of *Ahrensfield v. State Board of Education*, 126 N. J. L. 543, that one does not gain the protection of tenure procedures upon dismissal until he has fulfilled the precise conditions of the tenure statute. The rule is that where there is any conflict between a general and specific statute covering a subject in a more minute and definite way, the latter will prevail over the former and will be considered an exception to the general statute. *Ackley* v. *Norcross, et al.*, 122 N. J. L. 569, affirmed 124 N. J. L. 1933. Even if a very broad interpretation were to be given to the Commissioner's powers under 18:3-7, they could not be extended to the area of tenure because there is specific legislation on this subject. If injustice occurs to a teacher because litigation interrupts the continuity of the employment essential to the acquisition of tenure, the remedy must lie with the Legislature.

The Commissioner does not subscribe to the theory that there was an implied teacher-school board-superintendent relationship because of the litigation after the expiration of the academic year 1954-1955. N. J. S. A. 18:6-20 provides that no teacher shall be appointed except by a majority vote of the whole number of members of the Board. N. J. S. A. 18:13-5.7 makes further provisions concerning the employment of teachers. In *McCurdy* v. *Matawan*, 1938 S. L. D. 298, the question was whether employment was valid if the appointee did not receive a majority of the

whole membership of the Board of Education as required by law. The Commissioner held at p. 299 that full compliance with the statutory requirements as to the formalities of employment is essential to the validity of such employment. In *LaRose* v. *Board of Education of Egg Harbor City*, 1938 S. L. D. 377, at p. 388, the Commissioner said:

> "It is probable that the Legislature, in making conditions essential to legal contracts between boards of education and teachers, had in mind many boards of education whose contractual experience might be limited and it desired to protect such boards from incurring legal obligations except in formal contracts or under rules of employment which they definitely adopt."

There is no record nor claim that appellant was appointed by a majority vote of the whole number of members of the Board or that any other formalities of employment occurred for any period of employment after June, 1955. Hence, appellant did not fulfill the conditions for tenure according to N. J. S. A. 18:13-16 and, therefore, he has no claim to tenure. The Commissioner has already decided that he cannot confer tenure by his general powers of supervision and he has also explained that he makes no determinations concerning the employment or re-employment of teachers not protected by tenure. Therefore, the Commissioner can give no relief to appellant beyond ordering the payment of the salary due him between May 20, 1955, and the end of the academic year in June 1955. Having reached this conclusion, there is no necessity for considering and deciding other issues raised in this appeal.

The Board of Education of the City of Newark is directed to pay Perry Zimmerman, appellant herein, the amount of salary which would have been due to him from

the date of his suspension, May 20, 1955, to the termination of his employment, June 30, 1955. The petition is in all other respects dismissed.

COMMISSIONER OF EDUCATION.

November 9, 1960.

Office Supreme Court, U.S.
FILED
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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 588.

PERRY ZIMMERMAN,

Petitioner,

vs.

BOARD OF EDUCATION OF THE CITY OF NEWARK and EDWARD F. KENNELLY, Superintendent of Schools,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW JERSEY SUPREME COURT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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TABLE OF CONTENTS.

	PAGE
OPINIONS BELOW	1
QUESTIONS PRESENTED	2
STATUTES INVOLVED	3
New Jersey Statutes	3
STATEMENT	5
ARGUMENT:	
1. On the tenure issue submitted here no federal questions were raised by petitioner at any stage of the proceedings below	10
2. This case involves no federal questions	13
CONCLUSION	18

CASES CITED.

Ahrensfield v. *State Board of Education*, 126 N. J. L. 543, 19 A. 2d 656 (E. & A. 1941) 15

Chalmers v. *State Board of Education*, 11 N. J. Misc. 781, 168 A. 236 (Sup. Ct. 1933) 15

Dillon v. *LaPeer State Home*, 364 Mich. 1, 110 N. W. 2d 588 (Sup. Ct. 1961) 17

Gordon v. *State Board of Education*, 132 N. J. L. 356, 40 A. 2d 670 (E. & A. 1945) 15

Laba v. *Newark Board of Education*, 23 N. J. 364, 129 A. 2d 273 (1957) 2, 6, 7, 8, 9, 10, 11, 12, 16, 17

Lowenstein v. *Newark Board of Education* ("*Lowenstein I*"), 33 N. J. 277, 163 A. 2d 156 (1960) 2, 7, 9, 17

PAGE

Lowenstein v. *Newark Board of Education* ("*Lowenstein II*"), 35 N. J. 94, 171 A. 2d 265 (1961) 2, 8, 9, 17

Moresh v. *Board of Education of Bayonne*, 52 N. J. Super. 105, 144 A. 2d 897 (App. Div. 1958) 15

Moriarity v. *Board of Education of Garfield*, 133 N. J. L. 73, 42 A. 2d 465 (Sup. Ct. 1945), aff'd 134 N. J. L. 356, 46 A. 2d 734 (E. & A. 1946) 15

Nelson v. *Los Angeles County*, 362 U. S. 1 (1960) .. 17

Norwitz v. *Board of Harrison Township*, 128 N. J. L. 13, 23 A. 2d 914 (Sup. Ct. 1942) 15

Phelps v. *Board of Education of Town of West New York, N. J.*, 300 U. S. 319 (1937) 13

Schulz v. *State Board of Education*, 132 N. J. L. 345, 40 A. 2d 663 (E. & A. 1945) 15

Skladzien v. *Board of Education of Bayonne*, 12 N. J. Misc. 602, 173 A. 600 (Sup. Ct. 1934), aff'd 115 N. J. L. 203, 178 A. 793 (E. & A. 1935) 13, 14

Slochower v. *United States*, 350 U. S. 551 (1956) 3, 6

Vitarelli v. *Seaton*, 359 U. S. 535 (1959) 16, 17

Zimmerman v. *Board of Education of Newark*, 38 N. J. 65, 183 A. 2d 25 (1962) 9, 11, 12, 13, 16, 17

NEW JERSEY STATUTES CITED.

R. S. 18:6-12 14
R. S. 18:6-13 ..... 4, 13, 14
R. S. 18:6-20 ..... 4, 13, 17
R. S. 18:13-6 ..... 4, 14
R. S. 18:13-11 ..... 3, 16, 17
R. S. 18:13-16 ..... 3, 5, 15
R. S. 18:13-16(b) 16
R. S. 18:13-17 5

IN THE

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OCTOBER TERM, 1962.

No. 588.

PERRY ZIMMERMAN,

Petitioner,

vs.

BOARD OF EDUCATION OF THE CITY OF NEWARK and EDWARD F. KENNELLY, Superintendent of Schools,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW JERSEY SUPREME COURT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

Opinions Below.

The following opinions below are appended to the Petition: the opinion of the State Commissioner of Education, not officially reported (App. B,* pp. 19 to 29); the opinion of the State Board of Education, not officially reported (App. A, pp. 16 to 19); and the 1962 opinion of the New Jersey Supreme Court and the concurring opinions, reported at 38 N. J. 65, 183 A. 2d 25 (App. C, pp. 31-62).

* "App." as used herein refers to the Appendix to the petition for certification.

The opinion of the New Jersey Supreme Court in the companion case of *Laba* v. *Newark Board of Education*, 23 N. J. 364, 129 A. 2d 273 (1957); in which petitioner and two others (Laba and Lowenstein) were appellants, and the opinion of the State Commissioner of Education, not officially reported, in the same case, are not appended to the Petition. The Commissioner's opinion in that case, however, appears at pp. 9a to 18a of the printed volume identified as the "Joint Appendix" in *Laba* and filed with this Court as part of the record below.

Two opinions (not appended to the petition) of the New Jersey Supreme Court in the separate appeals of one of the *Laba* appellants (Lowenstein) to that court, in cases which may be considered as companion cases to petitioner's case, contain holdings applicable to the instant matter. They are reported as *Lowenstein* v. *Newark Board of Education* ("*Lowenstein I*"), 33 N. J. 277, 163 A. 2d 156 (1960), and *Lowenstein* v. *Newark Board of Education* ("*Lowenstein II*"), 35 N. J. 94, 171 A. 2d 265 (1961).

Questions Presented.

1. Was any federal question raised below on petitioner's present claim that he has acquired tenure of office?
2. Does a New Jersey public school teacher engaged for an academic year, who under New Jersey law had no contract for or right to employment beyond that year, who was dismissed before the end of that year on charges that he refused to answer, before a sub-committee of the House Un-American Activities Committee, questions relating to Communist Party affiliations, and whose dismissal was set aside by the State courts on

the basis of the procedural principles of *Slochower* v. *United States*, 350 U. S. 551 (1956), acquire, by reason of the invalidated dismissal, more than the right to service credit and salary for the full academic year covered by his employment contract?

3. Is petitioner, who was engaged as a teacher by respondent pursuant to New Jersey law for the 1954-1955 academic year ending June 30, 1955, and whose dismissal before the end of the academic year was set aside for the reason stated in "1", entitled to any employment or tenure rights which he would not have had under New Jersey law if he had served for the full academic year without interruption, and to which he is not entitled, under New Jersey law, even on the basis of full service credit for all of the 1954-1955 academic year covered by his employment contract?

4. Can petitioner acquire tenure of office as a teacher otherwise than as provided by the New Jersey tenure statutes on the basis of full credit for the periods during which he actually served as a teacher together with full credit for the periods during which he was entitled to serve under his contract of employment?

Statutes Involved.

New Jersey Statutes.

In addition to the New Jersey teacher tenure statute, R. S. 18:13-16, set forth in the petition (pp. 4-5) the following New Jersey statutes are involved:

R. S. 18:13-11. *Dismissal without good cause before expiration of contract.*

When the dismissal of any teacher before the expiration of a contract entered into between the teacher and a board of education shall, upon appeal, be decided to have been without good cause, the teacher shall be entitled to compensation for the full term for which the contract was made; but it shall be optional with the board of education whether or not the teacher shall teach for the unexpired term.

R. S. 18:6-20. *Acts requiring majority of whole board.*

No principal or teacher shall be appointed • • • except by a majority vote of the whole number of members of the board.

R. S. 18:13-6. *Teachers' contracts.*

Notwithstanding any provision of the law fixing or authorizing the fixing of the fiscal year from January first to December thirty-first or declaring for purposes of adjustment a fiscal year from July 1st to December thirty-first or providing for the making of appropriations on the basis of the calendar year, any board of education may enter into contracts for the services of teachers and other employees and fix and determine their salaries for the period from July first of any year for which such board shall have been organized, to June thirtieth of the succeeding year.

R. S. 18:6-13. *Organization of boards in cities of the first class.*

On July first of each year, or on the following day if that is Sunday, the board of education of every school district in a city of the first class shall organize by electing one of its members as president and another as vice-president, which officers shall

serve for one year and until their respective successors are elected.

(NOTE: Newark is a "city of the first class".)

Statement.

Petitioner and two other Newark school teachers (Laba and Lowenstein) were suspended on May 19, 1955 and were dismissed on June 28, 1955 by the Newark Board of Education (hereinafter identified as the "Board") as of the effective date of the suspension, May 20, 1955, on charges relating to their refusal to answer, before a sub-committee of the House Un-American Activities Committee, questions relating to affiliations with the Communist Party.

At the time of the suspension and dismissal, Laba and Lowenstein had tenure of office under R. S. 18:13-16, and the procedural provisions of R. S. 18:13-17 applied to them. Petitioner, however, was serving under a contractual engagement for the 1954-1955 academic year ending June 30, 1955, had no tenure at the time of his suspension and dismissal, and would not have acquired tenure even with service credit for the full 1954-1955 academic year (App. C, item "I", pp. 38-39).

Because the New Jersey statutes do not specify the procedures to be followed on charges made against non-tenure teachers before the end of their contractual term, the Board accorded to petitioner the same procedures which were accorded under R. S. 18:13-17 to the two tenure teachers (App. C, pp. 42-43).*

* There is a typographical error at App. p. 42, line 27. As the official reports of the applicable opinions of the N. J. Supreme Court show, the word "invokes" should be "involves."

The State Commissioner of Education (hereinafter identified as "Commissioner") ruled that the hearings held on the charges did not fulfill the due process requirements of *Slochower* v. *Board of Education*, 350 U. S. 551 (1956), which was decided while the appeals of the three teachers were pending, reversed the dismissals, and remanded the three cases for further proceedings by the Board. The New Jersey Supreme Court affirmed: *Laba* vs. *Newark Board of Education*, 23 N. J. 364, 129 A. 2d 273 (1957). The court held that the conduct of the teachers before the Congressional sub-committee warranted inquiry by the Board and the Superintendent of Schools as to whether they (a) "contumaciously or frivolously refused to answer before the House sub-committee" or (b) are "now" members of the Communist Party, or (c) are "now subject to its ideologies and disciplines"; and that if the facts developed in the remand proceedings were adverse to the teachers as to any of the three specified areas —or if they "refused to answer pertinent questions fairly submitted by their administrative superiors • • • then there would seem to be ample basis for board action within the broad and valid statutory standard embodied in R. S. 18:13-17." *Laba*, 23 N. J. at pp. 388, 389; 129 A. 2d at p. 287.

The court, in *Laba*, further ruled that, in the inquiry under the remand, the teachers had "a duty of cooperation and an affirmative burden in the establishment of their fitness" (23 N. J. at p. 392; 129 A. 2d at p. 289) and the "Newark school authorities may interrogate the • • • teachers with respect to their present and past association with the Communist Party and affiliated organizations and

are entitled to frank and full disclosures" (23 N. J. at p. 388; 129 A. 2d at p. 287).

In the remand proceedings the Board reinstated Mrs. Laba on the basis of her representations that she refused to answer before the sub-committee "on advice of counsel," that although she had been a member of the Party she no longer was a member, and that she was not subject to its influence (App. p. 59).

Lowenstein refused to answer, in the administrative inquiry conducted in 1957 pursuant to the remand, questions as to Communist ties prior to the summer of 1953. The Board interpreted *Laba* to mean that this warranted dismissal as of the original suspension in 1955, and dismissed him as of that date. The Commissioner held that the refusal to answer was misconduct which supported dismissal as of the date on which it occurred, but that the dismissal could not go back to the 1955 date because, on the basis of Lowenstein's statement that he refused to testify before the sub-committee "on advice of counsel", the Board made no finding of "frivolous or contumacious" conduct before the committee. The N. J. Supreme Court, in a unanimous decision, reversed and again remanded for further proceedings by the Board. *Lowenstein* vs. *Newark Board of Education*, 33 N. J. 277, 163 A. 2d 156 (1960). The court noted that after Lowenstein told the Superintendent of Schools that "he had claimed the privilege before the subcommittee on the advice of counsel, that subject was quite properly not pursued further. The matter of contumacious or frivolous refusal to answer • • • was thereby permanently removed from the case." (33 N. J. at p. 282; 163 A. 2d, at p. 158.) The court held further that both

Lowenstein and the Board had misconstrued *Laba;* there was no right to inquire into past Communist affiliations unless there was reasonable basis for "doubt" as to "subjection now rather than in the past." If there was, and only then, Lowenstein had to answer as to the past without setting any cut-off date arbitrarily fixed by him.

In the inquiry under the second Lowenstein remand the Board believed that there was a reasonable basis for doubt as to Lowenstein's denial of present Communist affiliations, and decided that his renewed refusal to answer inquiries beyond 1953 warranted dismissal. The New Jersey Supreme Court disagreed (in a 4-3 decision) as to the asserted basis for "doubt" and reversed the dismissal. *Lowenstein* vs. *Newark Board of Education,* 35 N. J. 94; 171 A. 2d 265 (1961).

The Board held its inquiry, under the remand as to petitioner, in 1957 during the same period when the first remand proceedings were conducted in the *Lowenstein* case. The Board concluded that although petitioner gave answers to the questions submitted to him, these answers fell short of the requirements of *Laba.* (Record—"On Motion To Recall Mandate And Petition For Certification" pp. 73a to 76a). The opinions in *Lowenstein I* and *Lowenstein II* having not yet come down the Board assumed (as it did under the first *Lowenstein* remand) that "now" as used in *Laba* related to Communist affiliations at the time of the suspension in May 1955 and that therefore, its finding of failure to "cooperate" in the inquiry under the remand called for dismissal as of that date, and adopted a resolution to that effect.

On appeal to the Commissioner from this action, petitioner claimed for the first time that during the pendency of the *Laba* appeal he had accrued tenure of office. The Commissioner ruled that, in consonance with the *Lowenstein* decisions, the 1957 proceedings could not support a dismissal as of the 1955 suspension, in view of petitioner's testimony at the 1957 inquiry that he had refused to answer before the sub-committee in 1955 on "advice of counsel" (App. B, pp. 21-23). The Commissioner accordingly reversed petitioner's dismissal, decided that this gave petitioner the right to the benefits of his employment contract for the 1954-1955 school year, and ordered that petitioner be paid his salary from the date of his dismissal in May 1955 to the end of that school year. Petitioner's claim that pending the litigation he had accrued tenure of office was rejected (App. B, pp. 23-29) and he appealed from this aspect of the Commissioner's decision. The judgment of the Commissioner was affirmed by the State Board of Education (App. A, p. 16).

The New Jersey Supreme Court unanimously affirmed the decision of the State Board. *Zimmerman v. Board of Education of Newark*, 38 N. J. 65, 183 A. 2d 25 (1962). (The Chief Justice of the state court concurred in a separate opinion which acknowledged that "Our holding that Zimmerman did not have tenure makes academic the finding that, if he had tenure, there nonetheless was cause for dismissal", but argued that on the issue of "cooperation" in the 1957 inquiry the court's mandate in *Laba* had been "disregarded", and the way in which that matter was handled should not be allowed "to pass without an expression of disapproval." This led to another concurring opinion (App. C, pp. 52-60) expressing disagreement by

three members of the court with the views on the "co-operation" issue as set forth in the first one, and holding as to that issue that "the record fully supports the conclusion reached by the Superintendent and the Board of Education." In a third brief concurring opinion one member of the court noted that the decision of the full court that petitioner "never achieved tenure status and therefore is not entitled to reinstatement on that basis" was "dispositive of the case" and there was therefore "no need for an excursion into tangential issues raised by the arguments" (App. C, p. 60). The entire court was thus in agreement that the result reached on the tenure question rendered "academic" the issue of "cooperation" in the 1957 inquiry. The foregoing summary of the concurring opinions is added because petitioner fancies in the "necessity of the Supreme Court of New Jersey to render three concurring opinions in this case" (Pet. p. 11) a significance which cannot be drawn from the opinions, especially in view of the court's unanimity on the tenure question, the only issue on which petitioner requests the intercession of the United States Supreme Court.)

ARGUMENT.

1.

On the tenure issue submitted here no federal questions were raised by petitioner at any stage of the proceedings below.

During the course of the proceedings in *Laba* no claim to tenure was made. In fact it was undisputed there that petitioner's "employment had about six weeks to go at the time of his suspension on May 19, 1955 and his dismissal

involves his status from that date to the end of the 1954-1955 school year." The above quoted assertion was made in the Board's brief in *Laba* (App. p. 42) and was not, at any point in the *Laba* proceedings, controverted by petitioner; and it was recognized by the court in the *Laba* opinion that tenure was not in issue. (23 N. J. at p. 370, 129 A. 2d at pp. 276-277, App. p. 42-43.) The court again in *Zimmerman* noted that it had "expressly recognized in *Laba* that Zimmerman was in a different category than the other two defendants there who were at that time protected by the tenure laws" (App. C, p. 42).

In *Laba* constitutional questions were of course raised and considered with reference to the dismissal question which was resolved in petitioner's favor. But these did not and could not have anything to do with any claim of tenure as to petitioner since as noted above no such claim had been made and was concededly not involved in *Laba*.

At the time of the *Laba* decision it was therefore clear to the parties and the state court that only the 1954-1955 contract year was the employment period under consideration. And even after that decision suggested further administrative inquiry on the dismissal issue, the Superintendent of Schools and the Board on three separate occasions during the course of the ensuing proceedings made note that the proceedings were not to be taken as a recognition of an employment relationship, beyond the 1954-1955 school year in controversy, with tenure implications which up to that point were acknowledgedly not in the case (App. pp. 43-44).

Not until after the Board's second action after the *Laba* decision did petitioner advance a claim to tenure. This he

did during the progress of the appeal leading to the *Zimmerman* decision,—*but only on the basis of state law*. The tenure grounds belatedly urged in the *Zimmerman* case were all *state grounds*, and the tenure issue was submitted in that case on state grounds only and without reference to any federal claim. This appears from the decisions at each level of the proceedings: the opinions of the Commissioner (App. p. 19), the State Board (App. p. 16) and the New Jersey Supreme Court (App. p. 31). As the opinion of the New Jersey Supreme Court shows, the contentions submitted and decided on the tenure issue were that petitioner had obtained tenure under the provisions of the New Jersey statutes (App. pp. 38-40, items "I" and "II"); and that the Board, by conducting the inquiry pursuant to the *Laba* remand, was estopped from denying the accrual of tenure in the course of the appeals (App. pp. 40-44, item "III"). Nowhere along the line of the appeal disposed of in *Zimmerman* was any federal right asserted on the issue of tenure raised in that appeal for the first time. We have been unable to find with reference to the tenure issue any mention of the Fourteenth Amendment or of any federal due process question—the only federal question presented here ("Questions Presented", Pet. pp. 2-3)—anywhere in the record or briefs below. Nor, notwithstanding Rule 23(1)(f), is there any reference to the contrary in the pending petition.

Tenure not having been claimed on any ground in *Laba*,—and having been claimed only on state grounds when it was eventually raised at all, in *Zimmerman*,—there is no federal question before the Court on the tenure issue, the only issue which petitioner asks this Court to review.

2.

This case involves no federal questions.

Petitioner's dismissal for his conduct before the subcommittee of the House Un-American Activities Committee stands reversed. This is the decision of the state court in *Laba* and *Zimmerman, supra.* Petitioner's statement that he "has been unsuccessful in his attempt to remove the stigma of this suspension and his ultimate discharge" (Pet. p. 9) is therefore without substance. He has been unsuccessful only in his attempt to obtain, through the invalidated dismissal, employment benefits which he did not possess when he was dismissed and to which he would not have been entitled as a matter of right under New Jersey law if the dismissal had not occurred.

Petitioner's employment rights at the time of his suspension and dismissal are controlled by the New Jersey school statutes as construed by the state courts. Cf. *Phelps* v. *Board of Education of Town of West New York, N. J.*, 300 U. S. 319 (1937).

In New Jersey a school board is a non-continuous body, without power to bind a successor board except as to those matters for which contrary provision is specifically made by statute. *Skladzien* v. *Board of Education of Bayonne*, 12 N. J. Misc. 602, 173 A. 600 (Sup. Ct. 1934), aff'd 115 N. J. L. 203, 178 A. 793 (E. & A. 1935). In districts like Newark the school board organizes anew on July 1 of each year, and the board's legal year is therefore July 1 to July 1 (R. S. 18:6-13).

The significance attached by the legislature to the process of teacher selection is reflected by R. S. 18:6-20

which requires, for the appointment of teachers, "A majority vote of the whole number of members of the board" as distinguished from a majority of those present at the meeting.

The state legislature has also demonstrated that the principle that a school board cannot take action reaching beyond the life of the board without specific statutory authority applies to the appointment of teachers. In most of the school districts of New Jersey (in fact in all except Newark and Jersey City, the only "cities" to which R. S. 18:6-13 applies) the school board's year is February 1 to February 1 (R. S. 18:6-12). Since the normal academic year ends on June 30 this resulted in an awkward situation, as no board, under the *Skladzien* principle, was able to select teachers for a full school year. This was corrected by the enactment of R. S. 18:13-6, which permits all boards "to enter into contracts for the services of teachers" to June 30th of the year following the year for which the board "shall have been organized." But even under that statute the 1954-1955 Newark school board was without power to take any binding action that would extend the employment of any teacher, including petitioner, for any contract period after June 30, 1955. The claim of petitioner that the reversal of the dismissal before the end of the 1954-1955 school year entitles him to a new employment, with consequent tenure of office, reaching into the next school year, actually rests on a contention that the 1954-1955 board was able to extend to him unintentionally an employment commitment which by the express language of the state statutes, and by the long established rule of *Skladzien*, it was powerless to give intentionally.

The New Jersey courts have consistently held that teacher tenure can be acquired only in the manner prescribed by R. S. 18:13-16. The state's highest appellate court has so ruled in *Ahrensfield* v. *State Board of Education*, 126 N. J. L. 543, 19 A. 2d 656 (E. & A. 1941):

> "It is axiomatic that the right to tenure does not come into being until the precise condition laid down in the statute has been met."

Other decisions to the same effect are *Chalmers* v. *State Board of Education*, 11 N. J. Misc. 781, 168 A. 236 (Sup. Ct. 1933); *Norwitz* v. *Board of Harrison Township*, 128 N. J. L. 13, 23 A. 2d 914 (Sup. Ct. 1942); *Moriarity* v. *Board of Education of Garfield*, 133 N. J. L. 73, 42 A. 2d 465 (Sup. Ct. 1945), aff'd 134 N. J. L. 356, 46 A. 2d 734 (E. & A. 1946). This state policy has been reaffirmed in the decision of the New Jersey Supreme Court in the within matter (App. C, p. 36).

Although the state courts have guarded against invasion of accrued tenure rights, they have not been willing to permit tenure to accrue when the right was not clear under the applicable statutes; and side door entry to teacher tenure status has not been countenanced. *Gordon* v. *State Board of Education*, 132 N. J. L. 356, 40 A. 2d 670 (E. & A. 1945); *Schulz* v. *State Board of Education*, 132 N. J. L. 345, 40 A. 2d 663 (E. & A. 1945); *Moresh* v. *Board of Education of Bayonne*, 52 N. J. Super. 105, 144 A. 2d 897 (App. Div. 1958).

The New Jersey legislature has taken pains to define the rights of a teacher not under tenure and serving for a contract term (which was precisely the status of petitioner at the time of his 1955 dismissal) when a dismissal before the

expiration of the contract "shall, upon appeal, be decided to have been without good cause." R. S. 18:13-11 provides that in such case,

> "* * * the teacher shall be entitled to compensation for the full term for which the contract was made; but it shall be optional with the board of education whether or not the teacher shall teach for the unexpired term."

The state court recognized in *Laba* that this was the statute which was applicable to petitioner's employment at the time he was dismissed. (23 N. J. at p. 370; 129 A. 2d at pp. 276-277.) (In passing it is necessary to point out that the reference—at page 7 of the petition—to the testimony of petitioner's principal, is misleading. As to the portion cited in the petition the actual testimony in its appropriate context (Record, "Transcript of Hearing, Perry Zimmerman, November 14, 21, 25, December 18, 1957", at page 72) is that "tenure automatically comes after an appointment of the fourth year"—which of course is the law under R. S. 18:13-16(b), as petitioner concedes: tenure on the basis of academic years of service can arise only after a "fourth contract" for service has been made (Pet. pp. 7-8). To the extent that the principal's version of the statute may be read to mean something else, the state court in *Zimmerman* held that it "overlooks the nature of the employment between a teacher and the Board" under the controlling state statutes and decisions.)

The *Nelson* and *Vitarelli* cases cited by petitioner at page 13 of the petition are not relevant to the within matter. In *Vitarelli v. Seaton*, 359 U. S. 535 (1959), the employee was serving in a position which was not in a tenure

category. Although he could have been discharged without cause, the government chose to dismiss him as a security risk but in doing so violated its own procedural rules governing dismissals on security grounds. During the pendency of his appeal the government invoked another dismissal procedure which this Court held could not influence the disposition of the appeal, since the pendente lite action of the government was taken only to "moot" the appeal. As was pointed out in *Dillon* v. *LaPeer State Home*, 364 Mich. 1, 110 N. W. 2d 588, 599 (Sup. Ct. 1961), the proposition represented by *Vitarelli* is that "where an authority's discretion is unbridled by law, the authority is nonetheless to follow the procedures it establishes for the removal of employees * * *." In *Vitarelli* and also in *Nelson* v. *Los Angeles County*, 362 U. S. 1 (1960), the employee was serving under an open end appointment which remained in force until it was lawfully terminated. Petitioner was serving for a fixed term ending June 30, 1955 and he had no employment rights thereafter unless he was given a new contract for the following academic year in the manner prescribed in R. S. 18:6-20, *supra*. Moreover no statute comparable to R. S. 18:13-11, *supra*, was involved in either *Vitarelli* or *Nelson;* and neither *Vitarelli* nor *Nelson* dealt with the kind of claim made by petitioner—a claim to tenure of office in municipal employment.

In view of the exceptional measures taken by the New Jersey Supreme Court to insure protection of the constitutional rights of the teachers in the *Laba*, *Lowenstein I*, *Lowenstein II*, and *Zimmerman* cases there is no warrant for petitioner's present allegation that there was a "refusal by the New Jersey Supreme Court * * * to give any

credence to petitioner's constitutional rights" in alleged "complete opposition" to other decisions of this Court (Pet. p. 14). The constitutional rights of the petitioner were abundantly guarded at every turn in the proceedings. The Commissioner, the State Board and the New Jersey Supreme Court agreed that their reversal of petitioner's dismissal entitles him to his salary, with the attendant service credit, for the 1954-1955 contract year for which he had been appointed and in which he was serving when the dismissal occurred. All three tribunals were in accord that he had a right to recover everything to which he would have been entitled by law if he had not been dismissed, but that he was not entitled to be additionally rewarded merely because he was dismissed. His effort to carve out of the dismissal a judicial tenure outside of the specifications of the state tenure statutes involved only questions of state law which were properly and fairly resolved on the merits. The effort here is to make federal capital out of an issue that involves no federal question.

Conclusion.

For the reasons hereinabove stated the petition for a writ of certiorari should be denied.

Respectfully submitted,

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December, 1962.

Office-Supreme Court, U.S.
FILED
JAN 3 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 588.

PERRY ZIMMERMAN,

Petitioner,

vs.

BOARD OF EDUCATION OF THE CITY OF NEWARK and EDWARD F. KENNELLY, SUPERINTENDENT OF SCHOOLS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW JERSEY SUPREME COURT.

REPLY BRIEF OF PETITIONER AND SUPPLEMENTAL APPENDIX.

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TABLE OF CONTENTS.

	PAGE
REPLY BRIEF	1
CONCLUSION	5

CASES CITED.

Braniff Airways v. *Nebraska Board*, 347 U. S. 590 (1954)	3
Bryant v. *Zimmerman*, 278 U. S. 63 (1928)	5
Charleston Ass'n v. *Alderson*, 324 U. S. 182 (1945)	5
Indiana ex rel. Anderson v. *Brand*, 303 U. S. 95 (1938)	5
Laba v. *Newark Board of Education*, 23 N. J. 364, 129 A. 2d 273 (1957)	2
St. Louis I. M. T. & So. Ry. Co. v. *Starbird*, 243 U. S. 592 (1917)	3
Slochower v. *Board of Education*, 350 U. S. 551 (1956)	2
Water Power Co. v. *Street Railway Co.*, 172 U. S. 475 (1899)	3, 5

Contents of Supplemental Appendix.

Petition of Appeal to Commissioner of Education	6
Affidavit of Perry Zimmerman	9

IN THE

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vs.

BOARD OF EDUCATION OF THE CITY OF NEWARK and EDWARD F. KENNELLY, SUPERINTENDENT OF SCHOOLS,

Respondents.

REPLY BRIEF OF PETITIONER.

This Reply Brief is submitted in response to the Respondents' Brief in Opposition. It is significant that the Respondents at no time deny the importance of the constitutional issues raised by the Petition. Instead, the Respondents claim that the acquisition of tenure is dependent upon the New Jersey tenure statute exclusively, devoid of any federal constitutional considerations. Further, the Respondents claim that even if important constitutional issues exist, they were not asserted properly during the proceedings at the state level. Not only are both contentions by the Respondents erroneous, but they are in direct contradiction of the record below.

It is true that the mode of acquisition of tenure is dependent upon state laws and regulations. But may the state prevent a teacher from acquiring tenure in the ordinary course of his employment, when the reason, and the sole reason, for not granting tenure is the fact that the teacher exercised his constitutional privileges before a Congressional Sub-Committee? Such state action, it is charged, violates due process and abrogates First Amendment rights. The Respondents' myopic viewpoint of teacher employment rights must be rejected. State action which arbitrarily deprives a teacher of his employment rights must, of necessity, raise federal questions.

We need not repeat the various unconstitutional activities of the Respondents which resulted in the denial to the Petitioner of his tenure rights. Our constitutional argument before this Court is, in essence, the same argument urged continuously before the state courts and administrative agencies. The initial proceedings against Mr. Zimmerman, which involved his automatic dismissal without a hearing to explain his conduct before the House Sub-Committee, were set aside by the New Jersey Supreme Court on the basis that Respondents violated the principles established by this Court in *Slochower* v. *Board of Education*, 350 U. S. 551 (1956). See the decision of the New Jersey Supreme Court in *Laba* v. *Newark Board of Education*, 23 N. J. 364, 129 A. 2d 273 (1957).

In subsequent proceedings before the Superintendent and the Newark Board of Education, the important constitutional issues raised by the Petition came into sharp focus. At the conclusion of these proceedings, no decision was made as to whether or not Zimmerman's use of the

Fifth Amendment was frivolous or contumacious. It was apparent that the refusal to recognize Zimmerman's tenure rights resulted from his exercise of constitutional privileges. The constitutional issues pertaining to tenure which are presented to this Court were asserted before the Commissioner of Education. These federal rights were delineated in the Petition of Appeal to the Commissioner of Education (see supplemental appendix attached hereto). In paragraph 3 of said Petition of Appeal, exception was taken to the Board's order, in that:

> "3. By the order aforesaid, the Board of Education of Newark violated the constitutional rights of the appellant under the Federal and New Jersey Constitutions, including the right to due process of law, freedom of speech and association, and other rights protected by the Fourteenth Amendment of the Federal Constitution and the rights guaranteed by the New Jersey State Constitution, * * *."

Further constitutional objections were urged in paragraphs 5 and 15 of the Petition of Appeal, and all of these objections were lodged with respect to the issue of reinstatement which, of necessity, carried with it tenure.

The denial of constitutional rights as they related to the issue of tenure was timely and sufficiently raised before the state court. The federal right need not be raised in any special or particular form. It suffices if the federal issue is relied upon and in a proper manner called to the state court's attention. See *Water Power Co.* v. *Street Railway Co.*, 172 U. S. 475 (1899) and *St. Louis I. M. T. & So. Ry. Co.* v. *Starbird*, 243 U. S. 592 (1917).

In *Braniff Airways* v. *Nebraska Board*, 347 U. S. 590 (1954), this Court held that a federal right or issue is

sufficiently presented even though reference to a specific portion of the federal constitution is omitted or the reference is incorrect. The important inquiry is whether the substance of the federal right was presented and contained in the record before the state tribunal.

Any doubt as to the adequacy of the raising of the federal questions is removed by examination of the opinion of the New Jersey Supreme Court (App. C, p. 31). While the opinion of the New Jersey Supreme Court is concerned primarily with state issues, that Court did consider the federal issues. In the opinion of the Court by Justice Schettino, we find the following reference to Zimmerman's constitutional arguments:

> "In his view, he is entitled to tenure because continued employment would have taken place but for the fact that he invoked before a Congressional subcommittee the protection afforded by the Fifth Amendment." (App. C at p. 31).

In Chief Justice Weintraub's concurring opinion, the federal issue is stated as follows:

> "The question is whether it is unreasonable to refuse to employ an individual because he claimed the privilege from self-incrimination." (App. C at p. 46),

Can there be any doubt that the federal issues were properly raised? The mention of the federal rights in the court's opinion below is sufficient in and of itself to preserve these issues for the purposes of this Petition. If the highest state court considers that the federal question was properly presented before it, then a further inquiry as to when or in what manner it was raised becomes unnecessary.

Water Power Co. v. *Street Railway Co., supra; Bryant* v. *Zimmerman*, 278 U. S. 63 (1928); *Indiana ex rel Anderson* v. *Brand*, 303 U. S. 95 (1938) and *Charleston Ass'n* v. *Alderson*, 324 U. S. 182 (1945).

Conclusion.

For the reasons hereinabove stated and as stated in the Petition for a Writ of Certiorari heretofore filed with this Court, this Petition for a Writ of Certiorari to the New Jersey Supreme Court should be granted.

Respectfully submitted,

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SUPPLEMENTAL APPENDIX.

Petition of Appeal to Commissioner of Education.

To the Commissioner of Education
of the State of New Jersey:

The appellant, Perry Zimmerman, of the City of Newark, County of Essex, and State of New Jersey, says:

1. The Board of Education of Newark, by its order dated June 24, 1958, unlawfully and improperly dismissed the appellant from its employ as of May 20, 1955; and without limiting the generality of the foregoing, appellant further states:

2. By the order aforesaid, the Board of Education of Newark violated the provisions of N. J. S. A. 18:13-17 in that the appellant's dismissal was not for inefficiency, incapacity, or conduct unbecoming a teacher, or other just cause.

3. By the order aforesaid, the Board of Education of Newark violated the constitutional rights of the appellant under the Federal and New Jersey Constitutions, including the right to due process of law, freedom of speech and association, and other rights protected by the Fourteenth Amendment of the Federal Constitution and the rights guaranteed by the New Jersey State Constitution, including, *inter alia*, Article I, Section I, guaranteeing due process of law; Article I, Section 6, guaranteeing liberty of speech; and Article I, Section 18, guaranteeing freedom of assembly.

4. By the order aforesaid, the Board of Education of Newark violated the principles and rules laid down by the Supreme Court of New Jersey in the case of *Laba v. Newark Board of Education*, 23 N. J. 364 (1957), in that the questions propounded by the Superintendent of Schools

upon which the Board has acted were not pertinent to any inquiry within the lawful right of the Superintendent of Schools or the Board of Education.

5. The hearing conducted by the Board of Education of the City of Newark denied to the appellant (a) a fair hearing as required by due process of law, and (b) his right to a hearing under N. J. S. A. 18:13-17 in that at no time was the appellant permitted to ascertain the respects, if any, in which the questions propounded by the Superintendent of Schools were pertinent to any inquiry which the Superintendent had a lawful right to make, notwithstanding repeated efforts by the appellant to ascertain their pertinency.

6. The Board of Education by its order aforesaid failed to give proper effect to the entire record of excellence of the appellant as a teacher.

7. Under any circumstances, the Board of Education by its order aforesaid, insofar as the said order upheld the appellant's dismissal as of May 20, 1955, violated the constitutional and statutory rights of the appellant.

8. The decision and judgment of the Board made on the 24th day of June, 1958, are not adequately supported by the record nor is there substantial evidence thereof.

9. The Board materially erred to the prejudice of the appellant in naming, constituting, and sanctioning Edward F. Kennelly as the hearing examiner.

10. The hearing examiner did not conduct a completely impartial, unprejudiced, and lawful hearing. The Board failed and neglected to make an independent inquiry as to the facts and improperly relied upon the conclusions, analysis, and special report of the Superintendent of Schools. The special report of the Superintendent of Schools manifests that matters were considered by the

Superintendent apart from the issues embraced in the mandate on the remand from the Supreme Court of New Jersey; the report further manifests that the hearing officer engaged in purely subjective considerations devoid of any reasonable standard in reaching findings and conclusions.

11. The proofs manifest that the hearing officer engaged ex parte in an investigation without notice to the appellant with respect to which the appellant has had no opportunity of participation or hearing. The conclusions, findings, and determinations of the Superintendent of Schools and of the Board were the result of whim, caprice, and prejudice; they were based upon purely subjective considerations and not on the violation of any ascertainable objective or of conduct.

12. The record before the Superintendent and before the Board exonerates the appellant and constitutes the basis for his reinstatement.

13. Prejudicial error was committed by permitting the charges of May 23, 1955, to be subsequently supplemented.

14. The findings of the Board do not support its conclusions.

15. The findings and conclusion of the Board are ultra vires and contrary to the statutes and rules in such case made and provided and the mandate of the Supreme Court and its opinion as reported in *Laba* v. *Board of Education of Newark, supra,* and constitute a violation of the "due process," "equal protection," and "privilege against self-incrimination" provisions of the State Constitution, and of the "due process" and "equal protection" provisions of the Federal Constitution.

WHEREFORE, appellant prays that an order be issued by the Commissioner of Education directing the reinstatement

of the appellant to his former position as teacher with the Newark Board of Education, with back pay to May 20, 1955.

LEVY, LEMKEN & MARGULIES,
Attorneys for Appellant,
By SEYMOUR MARGULIES,
A Member of the Firm.

MAURICE C. BRIGADIER,
Associate Counsel.

Affidavit of Perry Zimmerman.

STATE OF NEW JERSEY, }
COUNTY OF HUDSON, } ss.:

PERRY ZIMMERMAN, of full age, being duly sworn, according to law, upon his oath, deposes and says:

1. I am the appellant in the above entitled cause, and the statements contained in the foregoing petition of appeal are true to the best of my knowledge and belief.

PERRY ZIMMERMAN.

Sworn and subscribed before me }
this 19th day of August, 1958. }

BERNICE B. FIELD.

APPENDIX C.

Opinion of Supreme Court of New Jersey.

PERRY ZIMMERMAN,
Petitioner-Appellant,

vs.

BOARD OF EDUCATION OF THE CITY OF NEWARK AND EDWARD F. KENNELLY, SUPERINTENDENT OF SCHOOLS,
Respondents.

Argued April 23, 1962—Decided June 29, 1962.

MR. SEYMOUR MARGULIES argued the cause for petitioner-appellant (MESSRS. LEVY, LEMKEN & MARGULIES, attorneys).

MR. JACOB FOX argued the cause for respondents.

The opinion of the court was delivered by
SCHETTINO, *J.*

Appellant, Zimmerman, seeks reinstatement as a teacher with tenure in the Newark school system. His case was originally reviewed in *Laba* v. *Newark Board of Education*, 23 N. J. 364 (1957). But unlike the two other teachers involved in that case, Zimmerman had not achieved tenure status at the time he was dismissed, as of May 20, 1955. He now argues primarily that we should order the Board to re-employ him even though his annual teaching contract expired on June 30, 1955 and was not renewed. In his view he is entitled to tenure because continued employment would have taken place but for the fact that he invoked before a congressional subcommittee the protection afforded by the Fifth Amendment. He further argues that he is now entitled to tenure because he was actually employed for three consecutive calendar years required by N. J. S. A. 18:13-16. In the alternative he asserts that he was employed for three

consecutive academic years and that the period of litigation following his third academic year should be considered as a recognition by the Board of his continued status as an employee at the beginning of the required fourth academic year. The Board is estopped to deny this, he says, as it continued its investigation of him subsequent to his dismissal.

A brief summary of the events is as follows. Zimmerman and defendant Board of Education agreed by a writing on June 30, 1952, that he would begin teaching in the system on September 1, 1952. Similar agreements were made in the two succeeding years and he was considered a "satisfactory" teacher. On May 19, 1955 Zimmerman invoked the Fifth Amendment privilege against self-incrimination when he was called to testify before a subcommittee of the House Un-American Activities Committee in Newark. The questions he refused to answer were related to his Communist Party membership and association both past and present. After notice of suspension and based solely upon the charge that Zimmerman refused so to testify, the Board resolved on June 28, 1955 to dismiss him as of May 20, 1955. Zimmerman was successful in having that resolution reversed by this court in *Laba*, but he was not granted reinstatement. Instead, our opinion in that case recognized that a person "who is now a member of the Communist Party or who is now subject to its ideologies" should be dismissed (23 N. J., at p. 388) and that "the teachers' conduct before the Congressional subcommittee reasonably calls for a fitness inquiry during which the teachers have a duty of cooperation and an affirmative burden in the establishment of their fitness." 23 N. J., at p. 392.

The defendant Superintendent of Schools interviewed Zimmerman on May 16, 1957. Counsel for Zimmerman was present but was limited to the role of providing advice to Zimmerman when asked. Based upon the testimony at

this hearing the Superintendent filed a report with the Newark Board of Education along with seven "supplementary charges." Substantially for the reasons cited in the charges, the Superintendent recommended that Zimmerman "be not restored to his employment," but that if the Board were to reinstate Zimmerman until the end of the 1954-55 school year, the Superintendent recommended that Zimmerman should not be re-employed thereafter.

Board hearings on the charges were held in November and December 1957. Zimmerman's counsel was permitted to take part in the proceedings by examination and cross examination of witnesses. The Board, by resolution dated June 24, 1958, found him guilty of five of the supplemental charges and again dismissed him as of May 20, 1955. It expressly stated that it did not draw any inferences as to Zimmerman's then present membership or subservience to the Communist Party.

On appeal the State Commissioner of Education in part reversed the Board, holding that Zimmerman was entitled to his salary for the period between May 20, 1955 and June 30, 1955, citing *Lowenstein* v. *Newark Board of Education*, 33 N. J. 277 (1960), and in part affirmed, upholding defendant's refusal to re-employ Zimmerman. Zimmerman appealed to the State Board of Education which affirmed the Commissioner's determinations. Zimmerman appealed from the refusal to order re-instatement beyond the end of the 1955 academic year. While his appeal was pending before the Appellate Division, we certified the cause on our own motion.

No appeal was taken by the Newark Board of Education from the order for payment of salary for the period from May 20, 1955 to June 30, 1955. We shall consider, therefore, only the tenure claim.

[1] It has been said that the purposes of an educational system are to further the best interests of the community

at large, the teachers and especially the school children. Both the appointment of school teachers and the determination regarding their term of office are, subject to constitutional restrictions, within the power and control of the Legislature. Historically the employment relationship between a school teacher and the municipal school body has been one of master and servant, one subject to termination at will. Absent statutory provision a teacher was in a position similar to that of any other public employee whose employment was not protected by statute, *i.e.*, his employment was subject to contract or the pleasure of his employer, 4 *McQuillin*, Municipal Corporations § 12.250, p. 305 (3 ed. 1949); 78 *C. J. S.* Schools and School Districts §§ 152, 201 (1952). See *Vitarelli* v. *Seaton*, 359 U. S. 535, 539, 79 S. Ct. 968, 3 L. Ed. 2d 1012, 1016 (1959); *Forkosch*, Administrative Law § 116, pp. 177-78 (1956). In fact it was the right of either party, i.e. the school administration or the teacher, subject to the below limitations to terminate service before statutory tenure rights became effective. *Ahrensfield* v. *State Board of Education*, 126 N. J. L. 543 (E. & A. 1941). We note in passing that such an unprotected employee relationship is not uncommon in our State today for many public employees are still in such an unprotected and uncertain employment status. *New Jersey Civil Service Commission, Department Civil Service, Fifty Fourth Annual Report*, 1960-1961, p. 16.

In *People ex. rel.* v. *Chicago*, 278 Ill. 318, 116 N. E. 158, 160; L. R. A. 1917E, 1069 (Sup. Ct. 1917) the court stated the historically prevalent view:

> "A new contract must be made each year with such teachers as [the board] desires to retain in its employ. No person has a right to demand that he or she shall be employed as a teacher. The board has the absolute right to decline to employ or to reemploy any applicant for any reason whatever or

> for no reason at all. The board is responsible for its action only to the people of the city, from whom, through the mayor, the members have received their appointments. * * * Questions of policy are solely for the determination of the board, and when they have once been determined by it, the courts will not inquire into their propriety."

[2] Today, the powers of a board of education in appointment, transfer or dismissal are not so broad. They are limited by the Fourteenth Amendment of the United States Constitution. For example, in *Morris* v. *Williams*, 149 F. 2d 703, 708-09 (8 Cir. 1945), the court held that a custom or usage of a school board in discriminating against Negro teachers of Little Rock in respect to salaries solely on account of color violates the Fourteenth Amendment. The board's powers are also limited not only by the terms of the contract of employment but also by the New Jersey Constitution, by the Teacher's Tenure Act, and by other statutory provisions such as the Law Against Discrimination, N. J. S. A. 18:25-1 et seq. Cf. *Downs* v. *Board of Education, Hoboken*, 12 N. J. Misc. 345, 348, 171 A. 528 (Sup. Ct. 1934), affirmed on opinion below, 113 N. J. L. 401 (E. & A. 1934). Except as provided by the above limitations or by contract the Board has the right to employ and discharge its employees as it sees fit. Cf. *Halfacre* v. *Board of Education of Schools Dist. No. 167*, 331 Ill. App. 404, 73 N. E. 2d 124 (Sup. Ct. 1947).

In New Jersey, as well as elsewhere, today legislatures have provided that teachers may, by satisfying certain conditions, acquire permanent tenure so as to be subject to dismissal only for cause and in the manner provided by law. Such statutes changed the unlimited common-law right of boards of education to contract with teachers. In principle, civil service benefits and protection were accorded teachers by the legislatures. The objectives are to protect

competent and qualified teachers in the security of their positions during good behavior, and to protect them, after they have undergone an adequate probationary period, against removal for unfounded, flimsy, or political reasons.

The defendant Board contends that tenure statutes should be construed strictly and in favor of school boards on the ground that such statutes create a new liability on the part of such boards and that the statutes should be given a construction which is most favorable to the general public, not a construction which will subordinate the paramount rights and welfare of the general public and of school children to those of the teachers. For emphasis it asserts that a teacher's tenure is subordinate to the fundamental public policy of obtaining a better education for children (*Jacobs v. School District of Wilkes-Barre Township*, 355 Pa. 449, 50 A. 2d 354, 357 (Sup. Ct. 1947)) and that policy should guide a board's exercise of power to grant or deny re-employment to a probationary teacher at the end of a pre-tenure employment. The fear is expressed that the statute will be interpreted to deprive school administrators of their power and responsibility for the administration of schools.

[3] As we have already emphasized, teacher tenure is a statutory right imposed upon a teacher's contractual employment status. In order to acquire the status of a permanent teacher under a tenure law and with it the consequent security of permanent employment, a teacher must comply with the precise conditions articulated in the statute. *Moriarity v. Board of Education of Garfield*, 133 N. J. L. 73 (Sup. Ct. 1945), affirmed 134 N. J. L. 356 (E. & A. 1946); *Ahrensfield v. State Board of Education, supra;* 78 C. J. S., Schools & School Districts § 180, p. 1014 (1952).

In our State tenure status may be secured by a teacher only after employment for the probationary periods specified in N. J. S. A. 18:13-16 as follows:

> "The services of all teachers * * * of the public schools * * * shall be during good behavior and efficiency, (a) after the expiration of a period of employment of three consecutive calendar years in that district unless a shorter period is fixed by the employing board, or (b) after employment for three consecutive academic years together with employment at the beginning of the next succeeding academic year, or (c) after employment within a period of any four consecutive academic years, for the equivalent of more than three academic years * * *.
>
> An academic year, for the purpose of this section, means the period between the time school opens in the district after the general summer vacation until the next succeeding summer vacation."

Once a teacher acquires tenure status, he cannot be dismissed "except for inefficiency, incapacity, conduct unbecoming a teacher or other just cause" and certain procedural prerequisites are required. N. J. S. A. 18:13-17. See also N. J. S. A. 18:3-23 *et seq.*

Inherent in the tenure legislation is the policy that a board's duty to hire teachers requires more than merely appointing licensed instructors; it demands that permanent appointments be made only if the teachers are found suitable for the positions after a qualifying trial period. In essence this constitutes a "proving out" period. In another context, we said in *Cammarata* v. *Essex County Park Comm'n.*, 26 N. J. 404, 412 (1958):

> "It is difficult to evaluate the character, industry, personality, and responsibility of an applicant from his performance on a written examination or through cursory personal interviews. Knowledge and intelligence do not alone [suffice] * * *. The crucial test of his fitness is how he fares on the job

> from day to day when suddenly confronted by situations demanding a breadth of resources and diplomacy. Many intangible qualities must be taken into account, and, since the lack of them may not constitute good cause for dismissal under a tenure statute, the [employer] * * * is entitled to a period of preliminary scrutiny, during which the protection of tenure does not apply, in order that it may make pragmatically informed and unrestricted decisions as to an applicant's suitability."

The same thoughtful philosophy applies with manifold emphasis to the selection of school teachers. See *Morris*, *supra*, 149 F. 2d, at p. 708.

I.

[4] With the above authorities in view, we consider appellant's contentions. He contracted with the defendant on June 30, 1952, to begin teaching on September 1, 1952. In his view recognition of his employment status up through June 30, 1955 would constitute "employment" for the required period. In practice many, if not most, teachers are hired far in advance of the time they are to begin teaching. Contracts are frequently entered into during one academic year anticipating an employment relationship at the commencement of the following academic year. Thus, if appellant's interpretation of the word "employment" were to be adopted, tenure would be acquired in many instances before the teacher had completed teaching for three academic years. That interpretation would also shorten the length of the minimum probationary period specified in terms of "academic" years as the latter is defined in the last paragraph of N. J. S. A. 18:13-16, quoted above. Such a reading would clearly detract from the statutory purpose.

Appendix C—Opinion of Supreme Court of New Jersey.

Our former Supreme Court had occasion to interpret the word "employment" contained in N. J. S. A. 18:13-16 under similar circumstances and held contrary to the position urged by Zimmerman. *Carroll* v. *State Bd. of Education*, 8 N. J. Misc. 859, 152 A. 339 (Sup. Ct. 1930). There a teacher signed a one year teaching contract (and the Board approved it) on July 15, 1926, to begin teaching on September 7, 1926. Two subsequent annual teaching contracts were also entered into and each contained a provision that either party could terminate the agreement upon 30 days' notice. The board served notice on July 15, 1929, that it would terminate the relationship as of August 15, 1929. The court held that "employment" had not originally commenced until September 7, 1926, and, therefore, the teacher had not been employed for three calendar years. Compare *Chalmers* v. *State Board of Education*, 11 N. J. Misc. 781, 168 A. 236 (Sup. Ct. 1933).

We agree with this interpretation. Consequently, appellant was not employed for three calendar years prior to June 30, 1955, within the meaning of the statute. It follows that he is not entitled to tenure on that theory.

II.

Zimmerman's next contention is based upon the testimony of the principal of the school in which Zimmerman taught. In the opinion of that witness "tenure" would normally follow automatically where a teacher had received satisfactory ratings for three academic years. Up to the point of the House subcommittee hearings, Zimmerman had received such ratings. But the argument overlooks the nature of the employment relationship between a teacher and the Board.

[5] Except for statutory conditions, a teacher is retained solely on a contract basis during his probationary

employment. At the expiration of an annual contract period, the employment relationship ceases to exist unless a new contract has been entered into. While some states provide for automatic re-employment or renewal of contract unless contrary notice is given, our statute does not so specify. And except to the extent of constitutional or statutory limitations, there is no legal duty on the part of a board to re-employ a teacher at the end of a contract term. *Brooks* v. *School Dist. of Moberly, Mo.*, 267 F. 2d 733, 739 (8 Cir. 1959), cert. denied 361 U. S. 894, 80 S. Ct. 196, 4 L. Ed. 2d 151 (1959); *Rees* v. *Murray City Board of Education*, 6 Utah 2d 196, 310 P. 2d 387, 388 (Sup. Ct. 1957); *Bourne* v. *Board of Education of City of Roswell*, 46 N. M. 310, 128 P. 2d 733 (Sup. Ct. 1942); *Knickerbocker* v. *Redlands High School Dist.*, 49 Cal. App. 2d 722, 122 P. 2d 289, 291 (D. Ct. App. 1942); *Chase* v. *Mason*, 216 App. Div. 562, 216 N. Y. S. 205 (App. Div. 1925); aff'd 244 N. Y. 545, 155 N. E. 890 (Ct. App. 1926).

[6] Accordingly, unless Zimmerman by an affirmative act of the Board was re-employed subsequent to June 30, 1955, he cannot be said to have been employed for three consecutive academic years "together with employment at the beginning of the next succeeding academic year." N. J. S. A. 18:13-16. This statutory step had to take place, for, "it is axiomatic that the right of tenure does not come into being until the precise condition laid down in the statute has been met." *Ahrensfield*, *supra*, 126 N. J. L., at p. 544.

We hold that Zimmerman is not entitled to tenure status upon this ground.

III.

[7] If in 1955 after the 1954-1955 academic year the Board had decided to continue Zimmerman in its employ but stated in the resolution of employment that such em-

ployment should not constitute tenure, there could be no doubt that Zimmerman nevertheless would have tenure by operation of the statute. Recognition by the Board of an employment relationship continuing until 1957 would entitle Zimmerman to tenure.

Zimmerman contends that this is precisely what the Board did here, that the Board is now estopped to contend otherwise because it continued to hold hearings after June 30, 1955 and that, moreover, after each successive hearing the Board dismissed him as of May 20, 1955, the day after he relied upon his constitutional privilege before the House Committee. He concludes that he has been dismissed in violation of his tenure under N. J. S. A. 18:13-16 essentially because he invoked his constitutional privilege.

Defendants counter by pointing out that all of the proceedings leading to the dismissal reviewed in *Laba* were completed before the end of the 1954-1955 school year. A schedule of these proceedings would indicate that notification of suspension was given on May 19, 1955; charges were filed on May 23, 1955; the determination to dismiss was made on June 23, 1955, effective May 20, 1955; and the formal resolution and findings are dated June 28, 1955. Defendants say they preferred charges and held formal hearings not because appellant was under tenure but because it was necessary to determine whether there was good cause for dismissing Zimmerman for the then academic year, 1954-1955. Defendants conceded that if there was not good cause shown for the dismissal during the academic year, Zimmerman was entitled to his salary until the end of his contract term, N. J. S. A. 18:13-11, although he would not be entitled to continue as a practicing teacher in the school system.

Defendants further contend that Zimmerman himself caused the proceedings to extend beyond the 1954-1955 academic year by appealing from the action of the Board.

An employment status after that academic year should not be spelled out, they urge, merely because further hearings were necessitated by such appeals and by suggestions of this court. In their view, inasmuch as the Board was merely inquiring whether Zimmerman should be denied employee status for the remainder of his contract term, it would be anomalous to spell out of the entire proceedings an intention on defendants' part to recognize a continuing employee relationship after the 1954-1955 academic year.

We need not decide whether recognition of a continuing employment relationship might be implied under some circumstances. Compare R. S. 18:13-5, 18:13-6 and 18:13-7. Here, the evidence does not support an inference of such recognition. Indeed the proof is to the contrary and the Board expressly denied any such intention.

In its brief filed in *Laba* the Board made the following statement (at page 2):

> "Appellant Zimmerman did not have 'tenure' (R. S. 18:13-16) as did appellants Laba and Lowenstein. His employment had about six weeks to go at the time of his suspension on May 19, 1955 and his dismissal invokes his status from that date to the end of the 1954-1955 school year. Throughout the proceedings, however, it has been assumed that his employment *for that six weeks period* was subject to termination only under circumstances applicable if he had tenure (R. S. 18:13-17)." (Emphasis added.)

And we expressly recognized in *Laba* that Zimmerman was in a different category than the other two defendants there who were at that time protected by the tenure laws. (23 N. J., at p. 370):

> "[Mr. Zimmerman] began teaching in the public school system * * * in 1952 and had not acquired

> tenure protection when he was dismissed by the board. However, in view of the terms of R. S. 18:13-11, all of the parties and the State Commissioner have, *for present purposes*, not differentiated his case from the others." (Emphasis supplied.)

These statements clearly limit the effect of that proceeding.

In the proceedings which followed *Laba* defendants repeatedly denied any employment relationship between Zimmerman and the Board. At the end of his report dated May 16, 1957 the defendant Superintendent stated:

> "Note: Attention of the Board of Education is called to the fact that Mr. Perry Zimmerman had not acquired tenure as of the date of his suspension on May 19, 1955, and would not have acquired tenure even if he had remained in active teaching service to the end of the school year. Had that been the case, he would have completed only three years of teaching service. In order to acquire tenure it is necessary to have had more than three years of teaching service. Should the Board of Education determine for any reason to re-instate Mr. Perry Zimmerman for the period from May 19, 1955, to the end of the 1954-1955 school year—the only period involved in the Board's previous dismissal action—the Superintendent wishes to make it clear that he does not recommend the re-employment of Mr. Perry Zimmerman for any further or additional period of time that would result in his acquisition of tenure in the Newark public school system."

When on September 24, 1957 the Board ordered "further proceedings" in accordance with the "decision of the Supreme Court and the mandate thereon entered on February 4, 1957," it was careful to include the following in its resolution:

> "RESOLVED that the within resolution shall not be deemed to extend to the said Perry Zimmerman any employment or tenure status with the Board for any period beyond the 1954-1955 school year when the period of his probationary employment expired."

And the Board's resolution of June 24, 1958 setting forth its findings and conclusions on the supplementary charges contains the provision that:

> "The adoption of this resolution is not intended to constitute an acknowledgment that Mr. Zimmerman had any employment or tenure status with the Board, and shall not be deemed to extend to him any such status, for any period beyond the 1954-1955 school year, when the period of his probationary employment expired."

In view of these observations and disclaimers it would be patently unreasonable to spell out any implied recognition of an employment relationship.

The above statements also make it clear that the Board did not waive its right to deny Zimmerman's employee status. Nor can we sustain Zimmerman's argument that the Board is now estopped to deny an employment relationship. Even if we were to assume that the facts might give rise to an inference that the Board recognized Zimmerman as an employee, the doctrine of "estoppel" urged by Zimmerman requires an element of justifiable reliance upon the acts of another and resulting injury brought about by such reliance. Here the Board continually asserted that Zimmerman was dismissed on May 20, 1955 and repeated its disclaimer of any employment relationship after the 1954-1955 academic year. On these clear facts we think that Zimmerman could not justifiably rely on the Board's actions in the belief that his continuing employment was recognized by the Board.

The decision of the State Board of Education is affirmed; no costs.

WEINTRAUB, *C. J.* (concurring). I agree with the result reached in the opinion of the court but for the reason stated in "I" below.

It having thus been found that Zimmerman did not have tenure, we need not, for the purposes of this case, consider the manner in which the proceedings were handled, but since for the reasons in "II" below I believe our mandate on the prior appeal was grossly disregarded, I think we should say so, lest what happened here be repeated in another matter.

I.

As a general proposition, powers vested in local government must be exercised reasonably and the judiciary will review local action for arbitrariness. *Hertz Washmobile System* v. *South Orange*, 41 N. J. Super. 110, 132 (Law Div. 1956), affirmed 25 N. J. 207 (1957). The question is whether probationary employments are beyond that proposition.

The Legislature intended wide latitude in the employing authority to determine fitness for permanent employment. It is clear that public employment may not be refused upon a basis which would violate any express statutory or constitutional policy. A simple example would be discrimination for race or religion. But I am not sure such specific limitations are the only restraints. If the employing agency, for an absurd example, thought blondes were intrinsically too frivolous for permanent employment, a court would find it difficult to withhold its hand.

But if we may inquire into "unreasonableness," it would seem to follow that there must be a "reason," *i.e.*,

"cause" for refusal to continue the teacher into a tenure status. That course has its difficulties. It would not mean the court would not recognize a wide range of "reasons" or would lightly disagree with the employer's finding that the "reason" in fact existed. But it would follow that upon demand the teacher would be entitled to a statement of the grounds, with the right to a hearing and to a review as to whether the grounds are arbitrary in nature or devoid of factual support. But see *Vitarelli* v. *Seaton*, 359 U. S. 535, 539, 79 S. Ct. 968, 3 L. Ed. 2d 1012, 1016 (1959); cf. *Cafeteria and Restaurant Workers Union* v. *McElroy*, 367 U. S. 886, 81 S. Ct. 1743, 6 L. Ed. 2d 1230 (1961). Such individual inquiries could involve some practical problems in the administration of a school system.

I think the question might well be left for another day, since here the reason was given and I cannot say it is arbitrary in nature or unfounded in fact.

It is clear the Board would not continue Zimmerman because he pleaded the Fifth Amendment before the House subcommittee when his connection with communism was the subject of inquiry. As we held in *Laba* v. *Newark Board of Education*, 23 N. J. 364 (1957), the assertion of a federal constitutional right does not constitute "cause" for the dismissal of a teacher with tenure. Nor can that assertion support an inference that the teacher is disloyal. Here, however, we are dealing with a refusal to accord permanency to a probationary employee.

The question is whether it is unreasonable to refuse to employ an individual because he claimed the privilege from self-incrimination. Like it or not, the fact is that many people do draw from the claim of the privilege the very inference which legally may not be drawn. Even some who are tutored in law will privately draw the inference or harbor a doubt, albeit they understand that in public matters they must be faithful to what the *Constitution* commands. And as to many laymen, the plea of the Fifth

Amendment does envelop a teacher in suspicion or worse. He becomes a controversial figure.

Thus the issue is whether a school board may refuse to employ a teacher so situated when to employ him may involve the board in a controversy with an appreciable segment of the public. The question is not whether as an individual I would applaud a different decision. Rather the question is whether, as a judge I can denounce that decision as arbitrary. I do not see how I can. I believe the Board, taking into account the climate of the times and the fears, however unwarranted, of the parents of students, could conclude it is the course of prudent management to employ someone else. That, it seems to me, was the decision the Board made. The Board went too far when it attempted to terminate the existing annual contract of employment because of the claim of privilege, but I cannot say it exceeded its discretionary power when it refused to re-engage him thereafter.

II.

Our holding that Zimmerman did not have tenure makes academic the finding of the Board that, if he had tenure, there nonetheless was cause for dismissal. But the way in which the matter was handled so palpably violated the principles laid down in *Laba* and was so fundamentally unfair that we should not let it pass without an expression of disapproval.

In *Laba* we held that the plea of self-incrimination before the House subcommittee justifies an inquiry before the local Superintendent with respect to present loyalty. We said that in the inquiry the teacher must cooperate, and that if he refuses to answer pertinent questions so that a decision as to present loyalty cannot be made, he may be dismissed for refusing to answer. Thus the *target issue*

is present loyalty, but the teacher may be dismissed without a decision on the *target issue* if it cannot be reached because he *blocks* the inquiry *by silence*. In the words of *Laba* (23 N. J., at p. 389):

> "* * * If after the inquiry it appears that the teachers are now members of the Communist Party or are now subject to its ideologies and disciplines * * * or that they have *willfully refused to answer* pertinent questions fairly submitted by their administrative superiors * * * then there would seem to be ample basis for board action within the broad and valid statutory standard embodied in R. S. 18:13-17." (Emphasis added.)

Zimmerman appeared before the Superintendent. He answered *every question* put to him. Nonetheless, the Superintendent made no finding upon the *target issue* of present loyalty. Nor did the Superintendent find (and he could not) that Zimmerman *refused to answer* any question. Rather the Superintendent filed supplementary charges that:

> (1) Zimmerman "failed to fulfill his duty of cooperation" in the interview.
>
> (2) He "failed to give frank and full disclosures as to his past association with the Communist Party and affiliated organizations."
>
> (3) He "deliberately failed to accord to the Superintendent of Schools the frankness and cooperation which were due to the Superintendent" in the inquiry.
>
> (4) He "failed to fulfill the affirmative burden which was his * * * in the establishment of his fitness to teach."

(5) "The aggregate responses of the said Perry Zimmerman and his general demeanor and conduct in the said interview, evidenced a conscious purpose to evade, equivocate, and confuse."

(6) "Many of the responses * * * were incredible, indirect, or otherwise inadequate from the standpoint of forthrightness due from him in an inquiry to determine his fitness to teach."

(7) He, "by his aggregate responses and by his total conduct in the said interview, impeded a fair and conscientious inquiry by the Superintendent of Schools to determine" whether he is or was a member or subject to the ideologies and discipline of the Communist Party; "and was guilty of insubordination and conduct unbecoming a teacher."

Appended was a list of references to the transcript of the interview to which the Superintendent called "particular attention."

Upon these nebulous charges a hearing followed before the School Board. It was an aimless affair, and understandably so, since there was nothing to aim at. The Board, after alluding to a series of responses to the Superintendent's questions, joined in the characterizations embodied in the charges leveled by the Superintendent. The Board added some more of its own in the resolution it adopted after the hearing had ended, *i. e.*, that Zimmerman before it "evidenced resentment of and hostility to the entire inquiry, and a lack of forthrightness and candor."

The Board did disavow so much of charge No. 4 above as "implies that it was Mr. Zimmerman's legal burden to prove his fitness in the within proceedings" and hence "Charge 4 is dismissed." In this single respect, the Board was eminently correct, since *Laba*, although it referred to a teacher's "burden" to cooperate, did not impose upon

him the burden of proving fitness upon the pain of loss of tenure if he failed to persuade the interrogator. And since no testimony was taken as to Zimmerman's "demeanor" before the Superintendent, the Board concluded that so much of charge No. 5 as rests thereon "is dismissed." The Board added that it "has drawn no inferences as to present affiliation with or subservience to the Communist Party." Nor, as we have said, did the Superintendent make any finding on that issue.

Laba was perfectly plain in its mandate. The *target issue* of present loyalty was to be decided, unless *and only unless* the teacher *willfully refused to answer*. Zimmerman having answered, it was the plain duty of the Board to make a forthright decision of the *target issue*. It did not. Instead it devised a new basis for dismissal. It held that if the answers given impressed it as "evasive" or "incredible" (whatever that means in this context), it follows there was a lack of "cooperation" constituting cause for destruction of tenure rights.

The quality of the answers given was simply a factor to be weighed in deciding the *target issue* of present loyalty. When in *Laba* we held that a *willful refusal to answer* would constitute a basis for dismissal, I understood it to mean precisely that and nothing else. A refusal to answer blocks the inquiry. Here the inquiry was not blocked in the least. Indeed the Board did not find, and could not find, that the hearing was thwarted. The closest expression in that regard was its concurrence in the hazy charge (No. 7) of the Superintendent that Zimmerman "by his aggregate responses and by his total conduct in the said interview, impeded a fair and conscientious inquiry by the Superintendent." What specific answers so "impeded" the inquiry, we are not told. The most I gather from the rambling resolution is that the Board believed "The conclusion is inescapable that both at the interview and at the

Board's hearing the whole truth as to Mr. Zimmerman's past affiliation with and his reported withdrawal from the Communist Party was not disclosed by him." How that "inescapable" conclusion was reached and how it "impeded" a decision upon present loyalty, are not revealed. The thinking of the Board is hidden in a bushel of words.

It is one thing to discount testimony as evasive or incredible and hence unequal to evidence on the other side of an issue; that is routine in the process of resolving factual disputes. It is quite another thing to charge that such testimony constitutes an act of misconduct and then to adjudge the witness guilty upon nothing more than the same appraisal of the questioned testimony. That is what happened here, and it cannot be obscured by calling the alleged misconduct a "failure to cooperate." That mode of condemnation is foreign to our concept of justice.

Even *perjured* testimony "need not necessarily . . . obstruct or halt the judicial process. For the function of trial is to sift the truth from a mass of contradictory evidence, and to do so the fact finding tribunal must hear both truthful and false witnesses." *In re Michael*, 326 U. S. 224, 227-228, 66 S. Ct. 78, 80, 90 L. Ed. 33 (1945); see *People ex rel. Valenti* v. *McCloskey*, 6 N. Y. 2d 390, 189 N. Y. S. 2d 898, 160 N. E. 2d 647 (Ct. App. 1959), appeal dismissed 361 U. S. 534, 80 S. Ct. 585, 4 L. Ed. 2d 537 (1960); *People ex rel. Valenti* v. *McCloskey*, 8 N. Y. 2d 959, 204 N. Y. S. 2d 188, 168 N. E. 2d 853 (Ct. App. 1960).

It may well be that *perjury* constitutes an independent cause for dismissal. But, if so, perjury must be charged, and willful falsity must be proved. Here there was no charge of perjury, and no evidence whatever was offered to prove that any answer was in fact untrue. Rather the Superintendent and the Board simply concluded that, in their wholly subjective evaluations, some of the answers were "incredible" or "evasive." *Ergo*, there was "cause"

for dismissal. I cannot agree that the tenure status of public employees may be destroyed by a process so vague and arbitrary.

We all know that some people cannot see too clearly when loyalty is in issue and especially when, as here, a man admits he was once a member of the Communist Party. Indeed the danger is real that the administrative hearing will be but the guise for a predetermined result. The basis for discharge the Board here devised would be obviously intolerable if a tenure-employee were charged with something less befogging than communism. If the inquiry related, for example, to "moonlighting," I would think that no one would fail to see the injustice of a dismissal, not because of "moonlighting," but because the hearer thought some answers were "incredible" or "evasive." These are faceless words. A public employee is entitled to charges that can be nailed down and made the subject of a visible inquiry.

FRANCIS, *J.* (concurring): I agree with the opinion of the court that Zimmerman did not have tenure status when his teaching contract expired on June 30, 1955, and that the Board of Education was under no obligation to rehire him for the school year beginning September 1955.

In ordinary circumstances it is not the practice to comment on concurring opinions. They are not precedents and they are binding on no one. Frequently, however, they put forward constructive ideas or suggestions which merit sponsorship if and when the problem discussed is directly in issue. But when such an opinion criticizes a public agency unjustly, particularly when the criticism is not necessary to determination of the basic issue involved in the case, conventional considerations must be put aside. From my study of the record, I am convinced that the Superintendent of Schools and the Board of Education acted in the utmost good faith and did their conscientious

best to follow the earlier opinions of this court. But more than this: I believe the decision of the Superintendent and the Board were warranted on the evidence. Also, having in mind the sensitive area in which public school teachers work and the malleable minds they are engaged to develop, I am satisfied that the final action of the Board was in accord with the public interest. See *Adler* v. *Board of Education*, 342 U. S. 485, 493, 72 S. Ct. 380, 96 L. Ed. 517, 524 (1952).

On May 19, 1955 Perry Zimmerman, Estelle Laba and Robert Lowenstein, teachers in the public school system in Newark, New Jersey, were called to testify before a subcommittee of the House Un-American Activities Committee. On being questioned as to present and past membership in the Communist Party they declined to answer, relying on the protection provided by the Fifth Amendment of the *United States Constitution* against possible self-incrimination. Four days later, they were dismissed by the Board of Education. This court sustained a reversal of the dismissal by the State Commissioner of Education, holding that resort to the constitutional guaranty to avoid such questioning could not of itself justify discharge of a teacher. It was declared, however, that such a plea warranted an inquiry into past and present affiliation with the Communist Party, or adherence to its ideologies and disciplines in order to determine "present" or "current" loyalty to the United States Government. Accordingly, a remand was ordered to the Board of Education for that purpose. *Laba* v. *Newark Board of Education*, 23 N. J. 364 (1957).

Some observations in *Laba* should be recalled for purpose of reorientation. Speaking of the danger of Communist Party members as teachers in the public school system Justice Jacobs, speaking for the court, said:

> "The matter may no longer be viewed simply as one of academic freedom of thought and expression,

> for it has actually become one of self-preservation; we are convinced that Communism is an alien concept which is dedicated to the overthrow of our form of government, by force if necessary, and seeks to deprive us of the very basic constitutional liberties which we all hold so dear; * * *." 23 N. J., at p. 388.

That view is not peculiar to New Jersey. The United States Supreme Court referred to it as "the long and widely accepted view." *Barenblatt* v. *United States*, 360 U. S. 109, 128, 79 S. Ct. 1081, 1093, 3 L. Ed. 2d 1115, 1129 (1959). Moreover, in our sister state, Pennsylvania, the Supreme Court took judicial notice that the Communist Party is a subversive organization which conspires to teach and advocate the overthrow of the government of the United States by force and violence. *Appeal of Albert*, 372 Pa. 13, 92 A. 2d 663 (1952).

The opinion in *Laba* continued:

> "We have no doubt that in examining into their continued fitness to teach the Newark school authorities may interrogate the appellant school teachers with respect to their present and past associations with the Communist Party and affiliated organizations and are entitled to frank and full disclosures." At page 388.

And:

> "In the instant matter the teachers' conduct before the Congressional subcommittee reasonably calls for a fitness inquiry during which the teachers have a duty of cooperation and an affirmative burden in the establishment of their fitness." At page 392.

Laba quoted with apparent approval the opinion of the Association of American Universities that "invocation of

the Fifth Amendment places upon a professor a heavy burden of proof of his fitness to hold a teaching position and lays upon his university an obligation to re-examine his qualifications for membership in its society." It referred also to the report of the Association of American Law Schools' Committee on Academic Freedom and Tenure, "composed of distinguished legal scholars," to the effect that "a faculty member's invocation of the Fifth Amendment would not 'in and of itself' constitute ground for dismissal but was sufficient to call for a general fitness inquiry by his educational institution." At page 375.

On the remand, therefore, Zimmerman had a heavy duty of *cooperation* in the inquiry. Justification for interrogation did not rest alone on his use of the Fifth Amendment before the Congressional Committee. He was aware that the public policy of this State as established by the Legislature is opposed to appointment or retention of teachers in the public school system who believe in or advocate the overthrow of the State or Federal Government by force or violence. N. J. S. A. 18:13-9.1, 9.2; 41:1-3; N. J. S. 2A:81-17.1. He knew also that before entering the public service as a teacher in 1952 he had answered a loyalty questionnaire under oath which, among other things, asked if he had ever become "a member of any society or group of persons which teaches or taught or advocates or advocated that the government of the United States of America, or of any state or political subdivision thereof, should be overthrown, or overturned, or changed by force or violence, or any unlawful means?" His sworn answer to this was: "No," although admittedly he had been a member of the Communist Party at least from 1946 until the latter part of 1948. See *Laba, supra*, at page 373.

Moreover, since, unlike Mrs. Laba and Lowenstein, he did not have tenure, as this court unanimously agrees, his hearing took on a twofold aspect. His contract of em-

ployment terminated on June 30, 1955. Therefore, for purposes of determining rights under that contract, the issue of "current" or "present" loyalty or membership in the Communist Party or adherence to its aims and disciplines, within the meaning of *Laba*, related to the period from May 19, 1955 to June 30, 1955. Secondly; although the matter was not expressly stated in such terms, both Zimmerman on the one hand and the Superintendent of Schools and the Board of Education on the other, were conscious that, in fairness, a decision, should be made whether to continue or to re-engage him as a teacher in the system. On this latter phase of the matter obviously a much broader interrogation might justifiably be pursued.

The rehearing was held on May 16, 1957. I agree with the Board of Education that it was fairly and conscientiously conducted by the Superintendent. At its conclusion he found, among other things, that Zimmerman (1) had failed to fulfill his duty of cooperation in the inquiry, (2) had failed to give frank and full disclosures as to past association with the Communist Party, (3) had evidenced a conscious purpose to evade, equivocate and confuse, (4) had given many responses which were incredible, indirect and otherwise inadequate, and (5) that by his aggregate responses and his total conduct in the interview he had impeded a fair and conscientious inquiry to determine whether when he was suspended on May 19, 1955, he was or since that date had been or now is a member or subject to the ideologies and discipline of the Communist Party.

In response to the Superintendent's questions and to those propounded later by the Board of Education, Zimmerman admitted that he joined the Communist Party in 1946, but asserted inability to recall whether the Party solicited his membership or whether he sought out the Party. He paid dues to the Party but could not recall whether by check or cash ("Not the slightest recollection."). He alleged in-

ability to recall whether he carried a card as a member of the Party. During the 1946-1948 membership period he claimed to have very little idea of Communist Party theory, although at the subsequent hearing before the Board of Education he indicated that he had attended at least 50 Communist Party meetings while a member and that its program and purposes were discussed at them. On being asked if, when he joined the Party, he knew that one of its objectives was the overthrow of the government of this country by force, he said: "The answer is that I still do not believe that is part of the Communist Party program to do this which you state. The answer is no." Further, he said his experience with the Party revealed nothing that would establish incompatibility between membership therein and teaching in the public schools.

Zimmerman testified also there was no incompatibility between his membership in the Party in 1946 through 1948, and his sworn answer in the loyalty questionnaire that he had never been a member of any society or group of persons "which teaches or taught or advocates or advocated that the government of the United States of America * * * should be overthrown, or overturned, or changed by force or violence, or by any other unlawful means." He asserted that had he been asked if he had been a member of the Communist Party, he would have answered affirmatively. But since he did not know, on joining the Party or after attending more than 50 meetings at which its program was discussed, or any time, that such was the purpose of the Party, he considered the negative answer under oath to be proper.

On leaving the Party he remembered that he gave no formal resignation. But he could not say "with the slightest degree of accuracy" when he last paid dues. In any event, he regarded the subject of so little consequence as not to warrant an effort to recall or find out. In passing,

it may be noted that he characterized the Superintendent's interview as "savage," and with respect to the later hearing before the Board of Education he said he considered "this free wheeling inquisition itself an insult." In its findings, the Board commented upon Zimmerman's "low regard for his obligations at the Superintendent's interview," and that throughout his testimony before it "he evidenced resentment of and hostility to the entire inquiry, and a lack of forthrightness and candor." The Board declared "the conclusion to be inescapable that both at the interview and at the Board's hearing the whole truth as to Mr. Zimmerman's past affiliation with and his reported withdrawal from the Communist Party was not disclosed by him, * * *." I agree with the Board that his entire testimony fairly breathes an attitude of insolence and supercilious contempt for the questions that were put to him.

Zimmerman had been a Communist and he had been untruthful about it under oath when he was appointed a Newark teacher. He said he had left the Party in the latter part of 1948. Since he did not plead the Fifth Amendment until 1955, the Board not only had the right but was under the duty to satisfy itself reasonably, through fair interrogation, that he had in fact resigned from the Party in 1948 and no longer adhered to its ideology and disciplines. Zimmerman's duty, in view of his admitted history, was to cooperate fully and frankly in a reasonable endeavor by the Board to determine his loyalty at the time of suspension and thereafter until June 30, 1955.

"Present" loyalty or membership in the Communist Party or adherence to its principles, at the time of the reinterview and back to the end of 1948, were proper subjects of inquiry. Questioning, at least to that extent, would enable the Board to reach a conclusion whether he had left the Party in 1948 and was loyal when suspended in May 1955. Further, since he did not have tenure, and indicated a desire

to continue in the teaching profession, it was reasonable for the Board to delve into current loyalty, in the sense of loyalty at the time of the reinterview, so as to put itself in a position to give intelligent consideration to the question of reappointment to the system. In view of the restoration of Mrs. Laba after the reinterview with her, it cannot be said on the record that frank cooperation by Zimmerman would not have produced a similar result if the Board was satisfied that he had quit the Party and was no longer subject to its ideologies and disciplines.

But it would be blinding ourselves to reality to say that only by silence, *i.e.*, refusal to answer the Superintendent's questions, could Zimmerman improperly impede the loyalty inquiry. It is likewise unreal to suggest that because he answered every question put to him, he had cooperated to the extent called for by *Laba*. Obviously, the content of the answer and the honesty of the person giving it are of the essence.

Under the cases throughout the country, a former Communist Party member is not forever subject to discharge from a teaching post in the public school system in which he has tenure because of such membership alone. An honest *mea culpa*, in the sense of an actual withdrawal from the Party and abandonment of its program of overthrowal of our Government by force or violence, prior to the Board's inquiry, would remove the bar presented by the policy of our Legislature. Assuming that Zimmerman had done so, the history of these cases in Newark does not support the view that his suspension from May to June 30, 1955, would not have been withdrawn by the Board, or that the Board would not have given favorable consideration to reappointing him prospectively. But the Board was convinced, as I am, in view of his past history, that he did not meet the obligation imposed by his record, of cooperation with the inquiry, that he did not act in good faith during it, and

that by his attitude and demeanor, as well as by his incredible answers, he willfully prevented and frustrated the Superintendent's and the Board's attempt to ascertain his loyalty in 1955 and at the time of the reinterview.

In my judgment, therefore, analysis of all the facts revealed by the record fully supports the conclusion reached by the Superintendent and the Board of Education.

I am authorized to say that Justices SCHETTINO and HANEMAN join in this opinion.

PROCTOR, *J.* (concurring). The issue in this case is a narrow one, *i.e.*, is the appellant entitled to reinstatement as a teacher with tenure. I agree with the opinion of Justice SCHETTINO that the appellant never achieved tenure status and therefore is not entitled to reinstatement on that basis. Since the answer to this question is dispositive of the case, I see no need for an excursion into tangential areas raised by the arguments.

WEINTRAUB, *C. J.*, and JACOBS and HALL, *JJ.*, concurring in result.

For affirmance—Chief Justice WEINTRAUB, and Justices JACOBS, FRANCIS, PROCTOR, HALL, SCHETTINO and HANEMAN—7.

For reversal—None.

APPENDIX D.

Mandate on Affirmance.

SUPREME COURT OF NEW JERSEY

APPEAL DOCKET NO. 3795.

PERRY ZIMMERMAN,
Petitioner-Appellant,

vs.

BOARD OF EDUCATION OF THE CITY OF NEWARK AND EDWARD F. KENNELLY, Superintendent of Schools,
Respondents-Respondents.

Civil Action.
On Appeal.
Mandate on Affirmance.

This cause having been duly argued before this Court by Mr. Seymour Margulies, counsel for the appellant and Mr. Jacob Fox, counsel for the respondent, and the Court having considered the same,

It is hereupon ordered and adjudged that the decision of the said *State Board of Education* is affirmed without costs; and it is further ordered that this mandate shall issue ten days hereafter, unless an application for rehearing shall have been granted or is pending, or unless otherwise ordered by this Court, and that the record be remitted to the *State Board of Education* to be there proceeded with in accordance with the rules and practice relating to that court, consistent with the opinion of this Court.

Appendix D—Mandate on Affirmance.

WITNESS the Honorable Joseph Weintraub, Chief Justice, at Trenton on the 29th day of June, 1962.

JOHN H. GILDEA,
Clerk of the Supreme Court.

FILED
June 29, 1962
John H. Gildea
Clerk

A true copy——
John H. Gildea
Clerk